Indian Claims Commission

Chippewas of Kettle and Stony Point First Nation

Report on: 1927 Surrender Inquiry

March 1997

Indian Claims Commission

Commission des revendications des Indiens

102-02612/

March 13, 1997

Chief and Council
Chippewas of Kettle and Stony Point First Nation

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: Chippewas of Kettle and Stony Point First Nation
1927 Surrender Claim

The Chippewas of Kettle and Stony Point First Nation initiated proceedings before this Commission by letter dated August 26, 1993, from Chief Thomas Bressette of the Chippewas of Kettle and Stony Point First Nation, to the Commissioners of the Indian Claims Commission. On February 2, 1994, the Commission advised the Government of Canada and the Chief and Council of the Chippewas of Kettle and Stony Point First Nation that it would conduct an inquiry into Canada's rejection of the specific claim of this First Nation.

This inquiry deals with the validity of the 1927 surrender and the responsibilities and obligations of Canada to the First Nation regarding the way in which that surrender was obtained and dealt with. In the course of our deliberations, the Commission reviewed hundreds of pages of documents. In addition, the Commission held an information-gathering session at Chippewas of Kettle and Stony Point Reserve on March 8, 1995, where we heard directly from the elders. An expert evidence session and oral submissions from counsel for the parties on

CANADA

Éd. Enterprise Building, Suite 400 - 427 ouest, av. Laurier Ave. West
P.O. Box/C.P. 1750, Station/Succursale "B", Ottawa, Canada K1P 1A2
Tel (613) 943-2737 Fax (613) 943-0157

the legal issues raised in this inquiry were heard by the Commission on July 17, 1995, and on October 26, 1995, respectively. Both were heard in Toronto.

Our review of the historical background of this claim and our analysis, findings, and recommendation are contained in the attached report which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

Roger J. Augustine
Commissioner

Daniel J. Bellegarde
Commission Co-Chair

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE 1927 SURRENDER CLAIM OF THE CHIPPEWAS OF KETTLE AND STONY POINT FIRST NATION

PANEL

Commissioner Roger J. Augustine
Commission Co-Chair Daniel J. Bellegarde

COUNSEL

For the Chippewas of Kettle and Stony Point
Russell M. Raikes / Carol L. Godby

For the Government of Canada
Robert Winogron / François Daigle

To the Indian Claims Commission
Kim Fullerton / Ron Maurice / Isa Gros-Louis Ahenakew

March 1997

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PART I

INTRODUCTION

In 1827, the Indian peoples of the Kettle Point area along Lake Huron entered into Treaty 29, which covered most of what is now southwestern Ontario. Under the terms of this treaty, reserves were established to provide lands for the exclusive use and occupation of the Indians. This claim concerns the surrender of certain of these reserve lands in 1927 by the Chippewas of Kettle and Stony Point, 100 years after the treaty was signed. The land, described by the Indian Agent at the time of surrender as nothing but "white drifting sand, being worthless, for agricultural purposes," was surrendered for sale to a purchaser who intended to develop a clubhouse and summer cottages. That was the eventual result, and today the land in question is held by a number of owners, none of whom are members of the Chippewas of Kettle and Stony Point First Nation.

In November 1992, the Chippewas of Kettle and Stony Point First Nation initiated an action in the Ontario Court (General Division) regarding the 1927 surrender.[1] The First Nation alleged that the surrender was invalid, that it had been obtained by bribery and fraud, and that the Crown had breached its fiduciary obligations to the First Nation throughout the surrender process. A meeting took place between the First Nation and the Department of Indian Affairs and Northern Development (DIAND) on January 6, 1993, to determine whether the First Nation had a specific claim against Canada. Counsel for the First Nation and for Canada agreed that the litigation could be placed in abeyance if the Specific Claims Branch

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1 Ontario Court (General Division), Notice of Motion, Certificate of Pending Litigation, Chippewas of Kettle and Stony Point, Claim to an Interest in certain lands, November 6, 1992 (ICC Documents, pp. 704-13).

of DIAND accepted the claim for negotiation.[2] On March 31, 1993, Canada advised the Chippewas of Kettle and Stony Point that "a lawful obligation does not arise out of this claim and that there is no basis under the Specific Claims Policy to proceed to negotiations."[3]

On August 26, 1993, Chief Thomas Bressette of the Chippewas of Kettle and Stony Point First Nation asked the Indian Claims Commission (ICC) to review Canada's rejection of the claim concerning the 1927 surrender.[4] A Band Council Resolution authorizing the Commission to proceed was received on November 23, 1993.[5] The Commission advised the Chippewas of Kettle and Stony Point and the Government of Canada on February 2, 1994, that it would conduct an inquiry into this matter.[6]

The Commission convened planning conferences on April 18 and October 17, 1994, to clarify and resolve matters as much as possible at a preliminary stage. The Commission then held a session at the Kettle Point Reserve on March 8, 1995, during which we heard from the community on the claim. On July 17, 1995, there was a Commission session in Toronto where the parties explored the issue of band

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2 Russell Raikes to Judy Glover, A/Director Specific Claims East, February 11, 1993 (ICC Documents, pp. 761-66).

3 Judy Glover, A/Director, Specific Claims East, to Chief Thomas Bressette, Kettle and Stony Point First Nation, March 31, 1993 (ICC Documents, pp. 861-63).

4 Chief Thomas M. Bressette to Harry LaForme, Chief Commissioner, Indian Claims Commission, August 26, 1993.

5 Chief Thomas M. Bressette to Harry LaForme, Chief Commissioner, Indian Claims Commission, November 23, 1993.

6 Chief Commissioner Harry LaForme, Indian Claims Commission, to Chief and Council, Chippewas of Kettle and Stony Point, and to the Ministers of Justice and Indian Affairs, February 2, 1994.

membership. The Band and Canada made oral legal submissions in Toronto on October 26 and 27, 1995.

During the course of the Commission inquiry, the court action proceeded. Canada made a motion before the Ontario Court (General Division) for summary judgment, which was heard in December 1994. In essence, Canada asked the court to find that there was no issue of fact with respect to the validity of the surrender that would require a trial for resolution, and, further, that on the available facts the surrender was valid. On August 18, 1995, the court granted Canada's motion and dismissed that portion of the Band's case seeking a declaration that the land surrender and subsequent Crown patent were void.[7] This decision was upheld on appeal by the Ontario Court of Appeal on December 2, 1996.[8]

Appendix A outlines the chronology of the inquiry and the content of the formal record. Appendix B sets out the issues before this Commission as identified by the First Nation and Canada.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. Order in Council PC 1992-1730 empowers the Commission to inquire into and report on whether or not Canada properly rejected a specific claim:

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[7] *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Ont. Ct. (Gen. Div.)).

[8] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 (CA).

> AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[9]

Under this mandate, the Commission's task is to determine whether the Chippewas of Kettle and Stony Point First Nation have a valid claim for negotiation under the Specific Claims Policy. That Policy requires that a claim disclose an outstanding lawful obligation on the part of the Government of Canada before it may be accepted for negotiation. This report sets out our findings on the issue of lawful obligation and our recommendations to the claimant First Nation and to the government.

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[9] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

PART II

THE INQUIRY

Part II of the report examines historical evidence relevant to the claim of the Chippewas of Kettle and Stony Point First Nation. The Commission's inquiry into this claim included the review of four volumes of documents submitted by the parties as well as numerous exhibits. At the information-gathering session in the community on March 8, 1995, the Commission heard directly from a number of the members of the First Nation.

HISTORICAL BACKGROUND

The Band and the Reserve

The Chippewas of Kettle and Stony Point First Nation (formerly known as the Chippewas of Kettle Point and Stony Point Band) consists of 1699 members of whom 1029 live on Kettle Point Indian Reserve (IR) 44 and 670 live off reserve.[10] Kettle Point IR 44, the First Nation's only reserve,[11] is located in southwestern Ontario on Lake Huron, 35 kilometres northeast of Sarnia and 60 kilometres northwest of London.[12]

Reserve creation in southwestern Ontario took place after the War of 1812. Around 1818 more than 2 million acres located east of the St Clair River and

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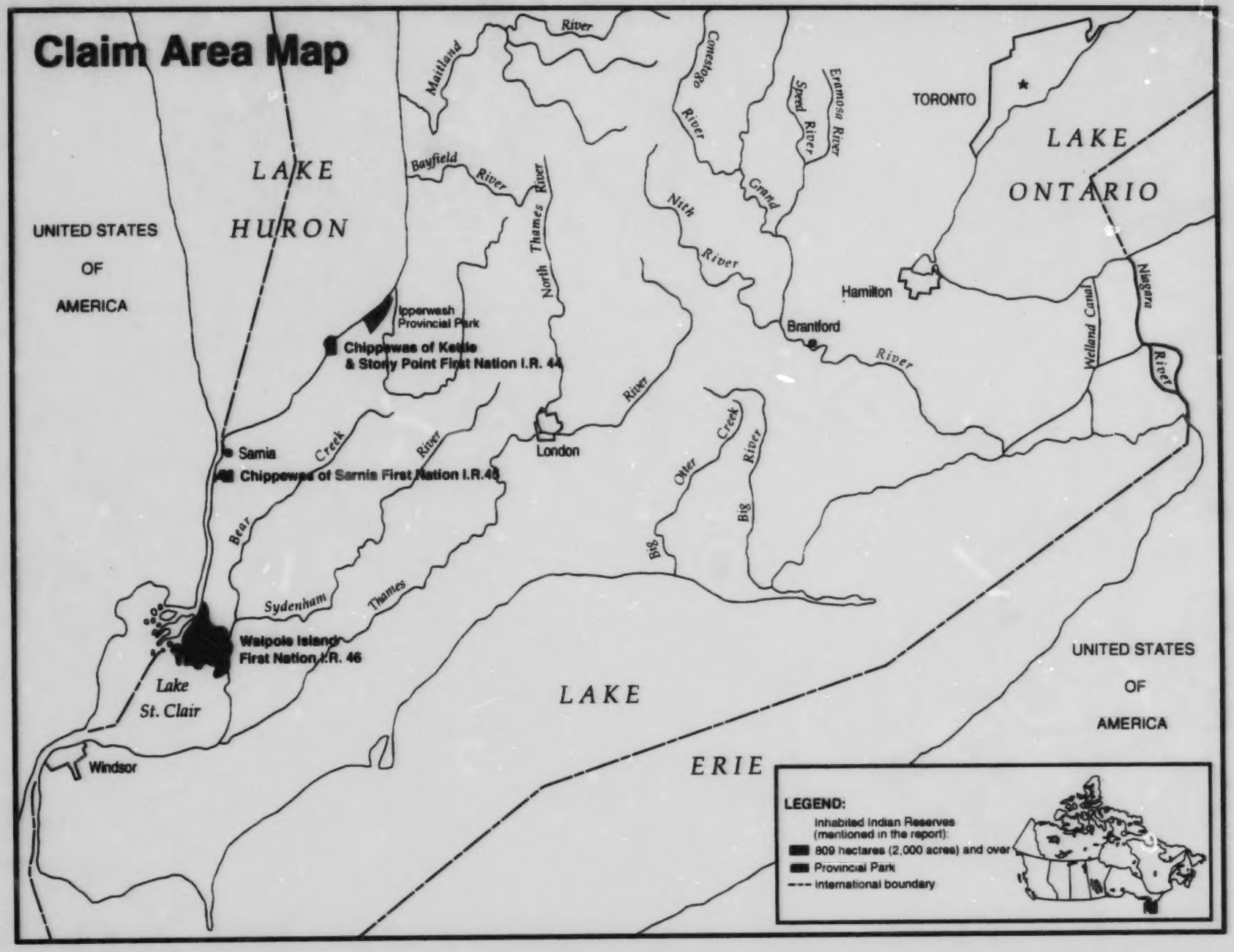
10 Department of Indian Affairs and Northern Development (DIAND), Departmental Statistics, Indian Register, December 31, 1996.

11 Stony Point IR 43, about three kilometres east of Kettle Point, was also the subject of a land surrender and sale of waterfront lands in the late 1920s. In 1942 the Stony Point Reserve was expropriated for military purposes.

12 DIAND, *Schedule of Indian Bands, Reserves and Settlements* (Ottawa: DIAND, December 1992), and Departmental Statistics. The Kettle Point Reserve encompasses 2095 acres, or 848.8 hectares.


Claim Area Map
LAKE HURON
UNITED STATES OF AMERICA
Maitland River
Bayfield River
North Thames River
Ipperwash Provincial Park
Chippewas of Kettle & Stony Point First Nation I.R. 44
Samia
Chippewas of Sarnia First Nation I.R.45
Bear Creek
Sydenham River
Thames River
London
Walpole Island First Nation I.R. 46
Lake St. Clair
Windsor
LAKE ERIE
Big Otter Creek
Big Otter River
Nith River
Grand River
Conestogo River
Speed River
Eramosa River
TORONTO
LAKE ONTARIO
Hamilton
Brantford
Welland Canal
Niagara River
UNITED STATES OF AMERICA
LEGEND:
Inhabited Indian Reserves (mentioned in the report):
809 hectares (2,000 acres) and over
Provincial Park
international boundary

southern Lake Huron, and known as the "Huron Tract," became the subject of treaty discussions with Chippewa chiefs and other Indian leaders in the area.[13] They requested reserves at several locations including Kettle Point and Stony Point.[14] A provisional agreement formalized the discussions in 1825.[15] And, after the necessary surveys,[16] Treaty 29, dated July 10, 1827, finally established reserves at Kettle Point, Stony Point, Sarnia, and Walpole Island for the Chippewas of Sarnia Band.[17]

Chippewas had been well established in southern Ontario since the early 18th century, but other nations were also in the area.[18] Especially after the American Revolution, Potawatomi, Ottawa, Chippewa, Shawnee, and other groups moved from south of the Great Lakes into Upper Canada. Many already had family connections across the border with the United States, but additional movement was stimulated by the U.S. policy of relocating Indians west of the Mississippi River, by a scarcity of game, and by an attachment to the Great Lakes environment.[19]

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13 Map, "The Huron Tract Purchase," Canada, *Indian Treaties and Surrenders* (Toronto: Coles, 1971), 71-75 (ICC Documents, p. 47).

14 R.J. Surtees, "Indian Land Surrenders in Ontario, 1763-1867," paper dated February 1984 (Ottawa: DIAND, 1983 [sic]), 82-85. Stony Point was also known as Aux Sable or Sable River.

15 Provisional Agreement, Treaty 27½, April 26, 1825 (ICC Documents, pp.1-2).

16 M. Burwell, Fieldbook, July 31, 1826 (ICC Documents, pp. 3-46).

17 Treaty 29, July 10, 1827, Canada, *Indian Treaties and Surrenders* (Toronto: Coles, 1971), 71-75 (ICC Documents, pp. 48-50).

18 E.S. Rogers, "Southeastern Ojibwa," in *Northeast*, ed. B.G. Trigger, vol. 15 of *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1978), 760-64.

19 James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potowatami into Upper Canada, 1830 to 1850* (Ottawa: National Museum of Man, 1975), 100.

Indian allies of the British residing in the United States had been receiving annual presents by crossing into British territory. In 1837 the British Indian Department announced it would no longer give presents to non-resident Indians. This change also encouraged thousands, mostly Potawatomi, to relocate from the United States to Upper Canada during the late 1830s and early 1840s. In the absence of specific treaty provisions for them, the Potawatomi newcomers had little choice but to wander, become squatters, marry into other bands, or assimilate into the settler society.[20] Some were taken into the Chippewas of Sarnia Band from which the Chippewas of Walpole Island Band and the Chippewas of Kettle and Stony Point Band were created.[21]

Walpole Island became a separate band in the 1860s,[22] but the Chippewas at Kettle Point and Stony Point did not gain independence from the Sarnia Band, 40 kilometres away, until 1919, when they became the Chippewas of Kettle and Stony Point Band.[23] Even after they became a separate band, Indian Affairs sometimes

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[20] James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potowatami into Upper Canada, 1830 to 1850* (Ottawa: National Museum of Man, 1975), 32-36, 65-68, 86-87; Helen Hornbeck Tanner, ed., *Atlas of Great Lakes Indian History* (Norman and London: University of Oklahoma Press, 1987), 126.

[21] James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potowatami into Upper Canada, 1830 to 1850* (Ottawa: National Museum of Man, 1975), 90-95.

[22] Nin.Da.Waab.Jig, *Walpole Island: The Soul of Indian Territory* (Walpole Island & Windsor: Commercial Associates, 1987, repr. 1989), 42-43.

[23] Agreement, Chippewas of Sarnia, April 15, 1919, National Archives of Canada [hereinafter NA], RG 10, vol. 2568, file 115678, pt. 2 (ICC Documents, pp. 136-37). When they were separated in 1919, the Sarnia Band had a population of 294 and the Kettle and Stony Point Band had a population of 135. Order in Council PC 915, May 1, 1919, Governor General in Council, NA, RG 10, vol. 2568, file 115678, pt. 2 (ICC Documents, pp. 138-39). Calculation, Indian Affairs, [1 May 1919], NA, RG 10, vol. 2568, file 115678, pt. 2, (ICC

referred to the Indians with reserves at Kettle Point and Stony Point as the "Chippewas of Chenail Ecarte and St. Clair," which is a geographically inaccurate name that harkens back to Treaty 29.[24]

OUTSIDE INTEREST IN RESERVE LAND

Initial Stage, 1900-20

Indian Affairs' eventual sanction of the Kettle Point and Stony Point people's long-standing desire to separate from the Sarnia people coincided with mounting outside interest in lakeshore lands at the Kettle Point and Stony Point Indian Reserves. Earlier, when the Sarnia Band's reserves were being surveyed for subdivision into lots, Indian Affairs had opposed dividing the Band because the Kettle Point and Stony Point residents opposed the survey.[25] Thus, in 1900, Indian Affairs took the position that the overall wishes of the Sarnia Band should prevail:

> [T]he Stony Point and Kettle Point Reserves are not the property of the Indians residing thereon, but are the common property of the whole Sarnia Band. It is very desirable to have the Reserves surveyed and subdivided into Lots, in order that the Indians residing thereon may be properly located and the surplus land available for location to other deserving Members of the Band.[26]

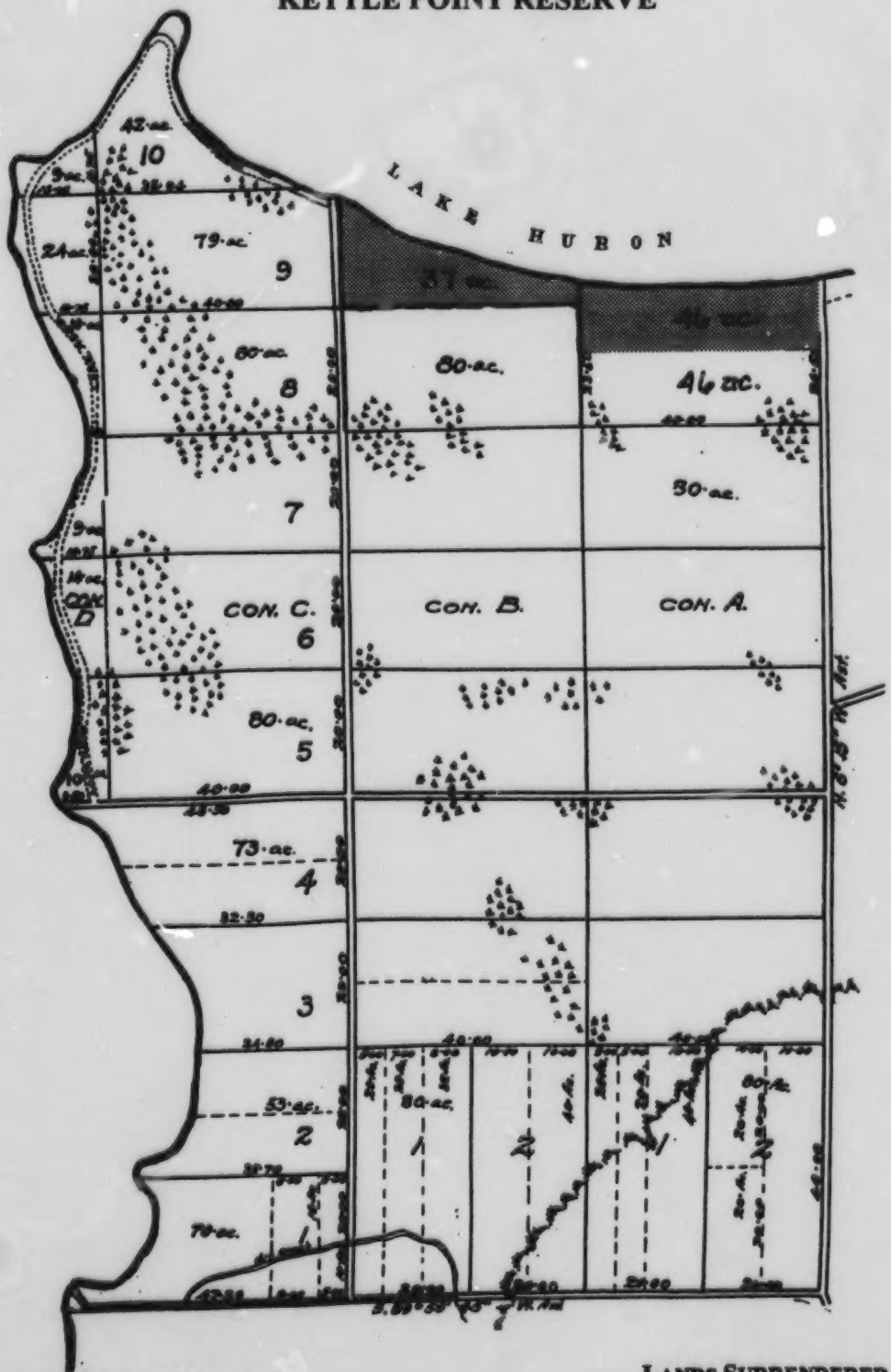
Documents, 140).

[24] Agreement, Chippewas of Sarnia, April 15, 1919, NA, RG 10, vol. 568, file 115678, pt. 2 (ICC Documents, pp. 136-37). "Chenail Ecarte and St. Clair" refer to the stream Chenail Ecarte in the vicinity of Walpole Island or Wallaceburg, Ont., and Lake St Clair and/or the St Clair River.

[25] Petition from Chief Johnson & 23 others, Ravenswood, Ontario, to C. Sifton, Indian Affairs, 2 Apr. 1900, NA, RG 10, vol. 2763, file 151900 (ICC Documents, p. 78).

[26] James A. Smart, Indian Affairs, to J. Fraser, MP, April 19, 1900, NA, RG 10,

KETTLE POINT RESERVE



LANDS SURRENDERED

Adapted from:
Plan of Indian Reserves at Kettle Point and Stony Point
W.S. Davidson, O.L.S.
Sarnia, June 20th, 1900

Since the survey went ahead, the Kettle Point lots eventually surrendered in 1927 and sold in 1929 were identified by 1900 as Lot 8, concession A, and Lot 9, concession B.[27]

In 1900, the surveyor described soil at both the Kettle Point and Stony Point Reserves as "good clay loam," which towards the north "becomes poor and sandy until near the lake shore it is drifting sand."[28] He was not blind to the value of the waterfront, however. Indeed, he alerted Indian Affairs headquarters to its recreational potential:

> The regular lots on Kettle Point Reserve are 20 chains wide and 40 chains long. The lots in Broken Front Concession D are very small but may be valuable for summer resort purposes as they adjoin the celebrated Kettle Point Bass fishing ground . . .[29]

Waterfront land at the Stony Point Reserve was so desirable that the Thedford Board of Trade wrote the local Member of Parliament in 1911 suggesting the "handful of People [Indians]" there be moved to permit development.[30] After World War I, Thomas Paul was appointed to fill a vacancy at the Sarnia Indian Agency. He oversaw the affairs of what was properly called the "Chippewas of Kettle Point

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vol. 2763, file 151900 (ICC Documents, pp. 86-87).

[27] Plan T290 & Plan 419, W.S. Davidson, "Plan of Indian Reserves at Kettle Point and Stony Point, Scale 20 Chains to an Inch," June 20, 1900 (ICC Documents, p. 125).

[28] Davidson to McLean, June 20, 1900, NA, RG 10, vol. 2763, file 152900 (ICC Documents, pp. 111-12).

[29] Davidson to McLean, 20 June 1900, NA, RG 10, vol. 2763, file 151900 (ICC Documents, pp. 111-12).

[30] Thedford Board of Trade to J.E. Armstrong, MP, Petrolia, Ont., December 14, 1911, NA, RG 10, vol. 7794, file number illegible (ICC Documents, pp. 127-28).

and Stony Point Band" from 1919 to 1930.[31] One of his first acts was to advise headquarters that tourists were using the lakefront road and beaches between Kettle Point and Stony Point.[32]

Several weeks later, W.R. White, another departmental official, suggested to the Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott, that the "beautiful sand beach" at Kettle Point should be leased:

> Another benefit which it was thought *should have accrued to this Department* was that the beautiful sand beach on lot 8, Con. A and lot 9, Con. B, could have been leased for summer resort purposes but the Indians refused to surrender it for lease.[33]

Shortly after White's memo to Scott, an agreement to separate under the authority of resolutions by "the Indians of Sarnia" and "the Indians of Kettle and Stony Points" appeared.[34] The separation was accomplished by May 1, 1919.[35]

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[31] The Sarnia agent's position had been vacant for months before Paul was appointed in 1919. When he left in 1930, the office was not filled again for two years. Previous Sarnia agents were A. English, c. 1899-1907; William Nisbet, 1908-11; R.C. Palmer, 1912-14; Timothy Maxwell, 1915-18. *The Canadian Almanac and Miscellaneous Directory* (Toronto: Copp Clark Co., 1899-1930).

[32] Agent Thomas Paul, Sarnia, to J.D. McLean, Assistant Deputy and Secretary, Indian Affairs, Ottawa, February 12, 1919, NA, RG 10, vol. 7709, file 23029-2A (ICC Documents, pp. 132-33).

[33] White to Scott, March 1, 1919, NA, RG 10, vol. 7709, file 23029-2A (ICC Documents, pp. 134-35). Emphasis added. The Commission has no information about W.R. White; it is not known whether or not he was related to John A. White who later purchased the Kettle Point lands.

[34] Agreement, Chippewas of Sarnia, April 15, 1919, NA, RG 10, vol. 2568, file 115678, pt. 2 (ICC Documents, pp. 136-37).

[35] Order in Council PC 915, May 1, 1919, Governor General in Council, NA, RG 10, vol. 2568, file 115678, pt. 2 (ICC Documents, pp. 138-39).

Local pressure for the establishment of a separate agency for Kettle Point and Stony Point followed because some felt the Indians there were "a disgrace to the community."[36] Appointing a farm instructor was also considered. If the Indians were "improvident," the Department's assistant accountant thought the farm instructor could make arrangements "to have the lands worked for the benefit of the owners."[37] D.C. Scott brought the matter to the attention of Arthur Meighen, Superintendent of Indian Affairs and the Minister of the Interior.[38] To our knowledge no action was taken.

Attempt to Lease Lakefront Lots, 1923

During the summer of 1923, local residents (including A.M. Crawford who later bought the land with John A. White) petitioned for a road through the Kettle Point and Stony Point reserves to gain access to the lakefront.[39] On August 29, 1923, W.I. Kemp and associates applied to lease Kettle Point lands to build a hotel and golf course. They hoped to avoid "a large initial outlay on the land itself," but, if

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[36] W.P. Fuller, Ravenswood, Ontario, to Head, Dept. of Indian Affairs, September 22, 1919 (ICC Documents, pp. 142-47); D.C. Scott to W.P. Fuller, October 6, 1919 (ICC Documents, p. 148); McKay to D.C. Scott, October 24, 1919 (ICC Documents, p. 149).

[37] McKay to D.C. Scott, October 24, 1919 (ICC Documents, p. 149).

[38] D.C. Scott to A. Meighen, Superintendent General of Indian Affairs and Minister of the Interior, November 13, 1919, NA, RG 10, reference illegible (ICC Documents, p. 150). Eight months later Meighen became prime minister.

[39] Petition, Ratepayers and residents of town of Thedford and Township of Bosanquet, Port Frank, Ontario, to C. Stewart, SGIA, Indian Affairs, Ottawa, August 10, 1923, NA, RG 10, vol. 7709, file 23029-2B (ICC Documents, pp. 155-57); C. Stewart, SGIA, Indian Affairs, to J.E. Armstrong, Port Frank, Ontario, September 5, 1923, NA, RG 10, vol. 7709, file reference illegible (ICC Documents, p. 161).

the Indians preferred to sell rather than lease, they wanted "to negotiate with the Indians on a basis satisfactory to all interested parties."[40]

Indian Affairs headquarters asked Agent Paul to determine if the Indians would be willing to either lease or sell and, if so, on what terms and conditions.[41] In response, Paul echoed the surveyor's view that "Lot 8, Range A, and Lot 8 and 9, Range B, Kettle Point Indian Reserve are of very little value, from an agricultural standpoint, being white sand."[42]

In anticipation of a vote on a surrender for lease, the self-described "Original" members of the Band (descendants of the Chippewas who had signed Treaty 29) contacted Indian Affairs through their lawyer, W.G. Owens. Mr Owens raised questions about the financial return, the composition of the Band, and the appropriateness of the development. His letter of September 19, 1923, is prophetic with respect to the surrender and sale of the same lands a few years later:

> [T]he proposition is . . . to lease . . . some 200 acres . . . close to . . . Ipperwash Beach for . . . thirty years at . . . $2.00 per acre, or $400 in all. The Lessee evidently proposes to sublet this property in a small lots suitable for summer cottages, and to derive therefrom a very large revenue. . . . On that basis it looks to our clients as though the interest of the band would suffer very considerably for the benefit of a private individual.
>
> We are further instructed that the band at Kettle Point is now practically in the control of certain individuals who have at some time or other been admitted to the band and who are not true Chippewas.

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[40] J.L. Kemp, Barrister, Ottawa, to DSGIA, Indian Affairs, August 29, 1923 (ICC Documents, pp. 158-59).

[41] J.D. McLean to Agent Thomas, September 4, 1923 (ICC Documents, p. 160).

[42] Paul to McLean, September 6, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 162).

> Some of them are French half-breeds who many years ago obtained admission to the band through intermarriage, and others are Pottowatomies who came in through Michigan and mingled with the band many years after 1827 when the original treaty was made. These people, French and Pottowatomies, now outnumber the original Chippewas and we are instructed are intent on putting through this proposed deal . . .
>
> . . .
>
> The proposed deal . . . is objectionable . . . also because of the disturbances and bad influence that may result from the installation of this proposed summer resort.[43]

The actual arrangement was to lease 209 acres at Kettle Point to Mr Kemp for cottages, a boardinghouse, a clubhouse, garages, bathhouses, boathouses, golf links, tennis courts, refreshment stands, et cetera at a rate of $400, $500, and $600, for the first, second, and third years, respectively.[44] Owens requested a hearing for his clients and a full investigation of the proposal to lease.[45]

Two votes were held; the first rejected the lease proposal,[46] and a second favoured the proposal but was poorly attended.[47] Meanwhile, Owens persisted in his

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[43] W.G. Owens to Superintendent General, Indian Affairs, September 19, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 163-64).

[44] Executed Articles of Agreement between Canada and Wesley Irving Kemp, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 176). Dollar figures for the fourth and succeeding years are typed over and illegible.

[45] W.G. Owens to Superintendent General, Indian Affairs, September 19, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 163-64).

[46] Minutes, General Council, William George, Secretary, September 21, 1923 (ICC Documents, p. 165); Agent to J.D. McLean, September 22, 1923 (ICC Documents, p. 166).

[47] Indian Agent [Paul] to McLean, October 13, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 177-78).

demand for a special investigation.[48] Although a 30-year lease agreement was signed by the elected Chief and Council on October 11, 1923,[49] Mr Paul recommended against it. Paul told headquarters the lease "would divide the Band . . . and cause trouble."[50] The protestors claimed the second vote was held without proper notice and that Paul had argued strongly in favour of the lease at the meeting.[51]

In the end, Indian Affairs decreed that there would be no further action on the lease because "the Department does not consider the vote taken satisfactory."[52] Privately, Paul was reminded to follow proper procedures:

> In view . . . of the complaint which has been made [with respect to the administration of the Kettle Point Indian Reserve], it would be well for you to use your best efforts to see that matters are conducted in

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[48] Owens to Superintendent General, Indian Affairs, October 1, 1923, NA, RG 10, vol. 8016, file 471/132-8-44-11 (ICC Documents, p. 168); McLean to Owens & Goodwin, October 1, 1923, (ICC Documents, 171); Owens to Secretary, Indian Affairs, October 11, 1923 (ICC Documents, p. 175).

[49] Executed Articles of Agreement between Canada and Wesley Irving Kemp, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 176).

[50] Indian Agent [Paul] to McLean, October 13, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 177-78).

[51] Owens to McLean, October 15, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 182-84). Caleb Shawkence et al. to Indian Affairs, October 13, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, pp. 179-81).

[52] McLean to Owens & Goodwin, October 19, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 185); McLean to Paul, October 19, 1923 (ICC Documents, p. 186); McLean to C. Shawkence, October 19, 1923 (ICC Documents, p. 187); McLean to Owens & Goodwin, October 20, 1923 (ICC Documents, p. 188); Owens to McLean, October 23, 1923, NA, RG 10, vol. 8016, file 471/32-8-44-11 (ICC Documents, p. 190).

> such manner as to avoid if possible, cause for any future complaint such as has recently been made.[53]

Crawford's Offer, January 1927

In May 1926 lobbying to have the lakeshore road improved escalated. Pointing out that "it is a matter of interest for the whole country to attract trade and Western Ontario has few if any such assets equalling the shore line round Kettle Point and Ipperwash Beach to Stony Point," the local community association appealed to Member of Parliament J.E. Armstrong for road work.[54] Accordingly, the Band was pressured into putting money and work into the road in July and December 1926.[55]

On January 15, 1927, "Crawford and Co." made their request to purchase the desirable lands at Kettle Point:

> We would like to purchase, the N. ½, of Lot, No. 8, Range, A, containing 46 acres, more or less, and all of Lot, No. 9, Range, B. containing 37 acres, more or less, on the Kettle Pt. Indian Reserve for the purpose of building a club house, and summer cottages.[56]

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[53] McLean to Paul, November 14, 1923 (ICC Documents, p. 196).

[54] D. Rymer, President, Forest Community Association, to J.E. Armstrong, MP, May 29, 1926, NA, RG 10, vol. 7709, file 230029-28 (ICC Documents, pp. 235-36).

[55] C.L. Huffman to J.E. Armstrong, May 31, 1926 (ICC Documents, p. 237); Armstrong to Scott, June 7, 1926 (ICC Documents, p. 238); Armstrong to Scott, June 12, 1926 (ICC Documents, p. 244); Armstrong to Scott, June 16, 1926 (ICC Documents, p. 245); R.H. Abraham, Agricultural Representative, Indian Affairs, Chatham, Ont., to Scott, June 19, 1926 (ICC Documents, pp. 246-47); Minutes, Band Council Meetings, July 8, 1926, and December 9, 1926 (ICC Documents, pp. 248-50).

[56] Crawford to Paul, January 15, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 251).

Even though no price was mentioned, Mr Paul supported a surrender for sale to Crawford:

> As this land is worthless, for agricultural purposes, being white drifting sand, and as the Indians have never received any revenue from the land described, I would recommend that the Department give the application careful and favourable consideration, and if approved by the Department, forward forms for surrender with instructions.[57]

Indian Affairs prepared a "Description for surrender" and sale to Mr Crawford. It identified 44 acres – not 46 acres – in Lot 8 and "all of" or 37 acres in Lot 9. The total amounted to 81 acres, not 83 acres.[58]

Before Crawford had stated any price in writing, Mr Kemp wrote to the Minister of Indian Affairs to offer to purchase 209 acres there (all of Lot 8, range A, and Lots 8 and 9, range B) for $15,000 or $71.77 per acre.[59] The Assistant Deputy and Secretary, J.D. McLean, instructed Paul to submit Kemp's offer to the Band before Crawford's but there is no evidence Paul did so.[60]

At this point, the Member of Parliament for West Lambton, W.J. Goodison, intervened on behalf of Crawford, writing to J.C. Caldwell, who was in charge of

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[57] Paul to McLean, January 15, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 252).

[58] "Description for surrender," January 24, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 254).

[59] McLean to Paul, February 21, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 261); Kemp to Minister of Indian Affairs Stewart, February 22, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 262-63).

[60] McLean to Paul, March 1, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 264).

the Lands and Timber Branch at Indian Affairs headquarters, to name a price of $85 per acre. For 83 acres (north half of Lot 8, range A, and all of Lot 9, range B), "[t]his offer is for [$7,055] cash," wrote Goodison.[61] Should the Indians want to sell more land, Goodison indicated Crawford was willing to pay for it at the rate of $85 per acre.[62]

Mr Caldwell recommended submitting the Crawford offer to the Band.[63] Deputy Superintendent General Scott forwarded the surrender documents and instructions to Paul on March 14, 1927, advising him to take a careful vote:

> pay particular attention to the requirement for furnishing a voters' list, showing the number of voting members of the Band present at the meeting called for the purpose of taking surrender, the number voting for the surrender and the number against.[64]

Other instructions were those sent to all Indian agents regarding the procedures for taking a surrender. Issued in 1925 but still in effect in 1927, they stipulated that:

> 2. An officer duly authorized . . . shall . . . make a voters' list of all the male members of the band of the full age of twenty-one years who habitually reside on or near and are interested in the reserve in question.

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[61] Goodison to J.C. Caldwell, In Charge, Lands & Timber Branch, Indian Affairs, March 11, 1927, NA, RG 10, reference illegible (ICC Documents, p. 267).

[62] Goodison to J.C. Caldwell, In Charge, Lands & Timber Branch, Indian Affairs, March 11, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 268).

[63] Caldwell to DSGIA, March 14, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 270).

[64] DSGIA to Paul, March 14, 1927 (ICC Documents, p. 271).

3. The meeting or council for consideration of surrender shall be summoned according to the rules of the band, which unless otherwise provided, shall be as follows: – Printed or written notices giving the date and place of the meeting are to be conspicuously posted on the reserve, and one week must elapse between the issue or posting of the notices and the date for meeting or council. The interpreter . . . must deliver, if practicable, written or verbal notice to each Indian on the voters' list, not less than three days before the date of the meeting . . .

4. The terms of the surrender must be interpreted to the Indians . . .

5. The surrender must be assented to by a majority of the Indians whose names appear upon the voters' list, who must be present at a meeting or council summoned for the purpose as hereinbefore provided.

6. The officer duly authorized shall keep a poll-book and shall record the vote of each Indian who was present at the meeting or council and voted.

7. The surrender should be signed by a number of Indians and witnessed by the authorized officer, and the affidavit of execution of the surrender should be made by the duly authorized officer and the chief of the band and a principal man or two principal men before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

8. The officer taking the surrender should report the number of voting members of the band as recorded in the voters' list, the number present at the meeting, the number voting for and the number against the surrender.[65]

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[65] Instructions for guidance of Indian Agents, D.C. Scott, February 13, 1925 (ICC Documents, p. 229).

When Paul received the surrender Form No. 65 made out by headquarters for an 81-acre surrender, he changed the acreage to 83 acres by writing over the figures.[66]

KETTLE POINT SURRENDER VOTE, MARCH 30, 1927

At a General Council on March 30, 1927, Robert George and Sam Bressette moved to accept Crawford's $85 per acre offer. Only Crawford's name was mentioned, and there was no reference to the cash "bonuses" or "bribes" that later became an issue. The motion simply read:

> Moved . . . that the sale of the north 1/2 of lot 8, Range A, and all of lot No. 9, Range B, Kettle Point to Mr. A. Mackenzie Crawford of Sarnia, Ontario, containing 83 acres be approved of. The price to be $85.00 per acre cash and that 50 per cent of the purchase price be distributed among the members of the Band.[67]

The Agent's "Poll Book," dated only "March 1927," indicates by the mark X against 27 of the 39 names listed there which members "Voted For." The "Voting Against" column is blank; however, in the "Remarks" column there is the cryptic note: "P.S. Those members on List were absent, at this meeting, who did not vote."[68] Paul recorded that 27 voted for the surrender and that the voting

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[66] Surrender of Lot 9, con. B, and Pt. Lot 8, con. A, Kettle Point Reserve, March 30, 1927, Form No. 65 (ICC Documents, pp. 280-82).

[67] Minutes, March 30, 1927, General Council, William George, Secretary (ICC Documents, p. 277), and copy of Minutes, March 30, 1927, General Council, Thomas Paul, Agent (ICC Documents, p. 278).

[68] "Poll Book, Re: McKenzie [sic] Crawford's Application to Surrender [sic] N 1/2 Lot 8, Rge 'A' & all of Lot 9, Rge 'B', Kettle Pt., March 1927," NA, RG 10, vol. 7794,

strength of the Band was 44.[69]

On March 30, 1927, Chief John Milliken, Robert George, Sam Bressette, John Elijah, Dan Bressette, and James Henry, as "Chief and Principal men of . . . Chippewas of Chenail Ecarte and St. Clair," surrendered 83 acres at Kettle Point "on behalf of the whole people of our said Band in Council assembled" to the Crown "on trust to sell the same at a price of Eighty-five dollars per acres, cash, to such person or persons, and upon such terms as the Government . . . may deem most conducive to our Welfare and that of our people."[70] Affidavits by Thomas Paul and the Chiefs and councillors confirming that the surrender was correctly assented to were sworn, in an irregular fashion, before Mr Paul himself at Kettle Point on March 30, 1927. The affidavits stated that:

> the surrender was assented to by a majority of . . . male members . . . of the full age of twenty-one years entitled to vote, all of whom were present at the meeting or council.

and

> no Indian was present or voted at such council or meeting who was not a habitual resident on the reserve of the said band of Indians and interested in the land mentioned in the said release or surrender.[71]

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file 29029-2 (ICC Documents, pp. 285-87).

[69] "Copy of Poll Book, Kettle Point Surrender, Re: McKenzie [sic] Crawford," March 30, 1927 (ICC Documents, p. 288).

[70] Surrender of Lot 9, con. B, and Pt. Lot 8, con. A, Kettle Point Reserve, March 30, 1927, Form No. 65 (ICC Documents, pp. 280-82).

[71] Surrender of Lot 9, Con. B and Pt. Lot 8, Con. A, Kettle Point Reserve, March 30, 1927, Form No. 66 (ICC Documents, p. 283).

By Order in Council PC 842 on May 11, 1927, Canada accepted this surrender for sale of 83 (not 81) acres at Kettle Point IR 44 by the "Chippewas of Chenail Ecarte and St. Clair Band" as having "been duly authorized, executed and attested in the manner required by the 49th Section of the Indian Act."[72] This acceptance was in spite of several obvious irregularities: the anachronistic band name on the surrender documents, the minor discrepancy in acreage, and the fact that Agent Paul had sworn his own affidavit.

Irregularities and Protests around Vote, 1927

Other irregularities, not immediately apparent from the surrender papers, surfaced later. On the one hand, not all the voters who "voted for" were present at the meeting. On the other hand, Crawford was present and very directly involved in obtaining the surrender. Also, Crawford paid or expected to pay individual "bonuses" which were above the $85 per acre. Anticipating trouble, Crawford assured Goodison that every eligible voter would receive some extra cash. On April 1, 1927, Mr Crawford wrote:

> I think I forgot to tell you that all the Indians of the band over twenty-one that have a vote will get their bonus just the same as the ones that did vote.
>
> We tried to buy it that day for $100.00 per acre, but they all said they had to have some money right away. So we agreed to pay them $85.00 per acre and $15.00. There was nothing underhanded everything was disgust (sic) at the meeting.
>
> There was one surrender paper that had been overlooked and I had to go back the next day to have the Chief and councillors sign it.

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72 Order in Council, PC 842, May 11, 1927 (ICC Documents, p. 284).

> I had to go to their homes, and I am quite satisfied they needed a little money.[73]

As Crawford was writing to Goodison on April 1, 1927, Mr Paul was writing two different letters to headquarters on the same day. One dealt with the "bonuses" and implied that Paul had little control over the circumstances of the vote:

> Mr. Crawford agrees to pay to the Indians, qualified to vote, whether voting for, the surrender or against it, a Bonus, of $15.00, each, that is the 44 qualified voters, will each receive $15.00, as a cash bonus, after he receives his deed, from the Department. I might say, that I advised against this procedure, but Mr. Crawford and especially the Indians, seemed determined to have it this way.
>
> Possibly the immediate need of money stimulated this action.
>
> Trusting that this will not create sufficient irregularity, to cancel, this meeting, and sale of land, to Mr. Crawford . . .[74]

The other letter that Mr Paul wrote to headquarters on April 1, 1927, failed to mention the "bonuses." Moreover, it misrepresented the number of voters present at the March 30, 1927, meeting:

> There were present, at this meeting, 27 members, who were qualified to vote, on this question, who all voted in favour of the surrender, at a price of $85.00, per acre, cash, when approved of by the Department. The voting strength of the Band, being 44, and the number voting for the surrender, 27, gives a majority, in favour of the surrender, it is understood, that when the purchase price is paid in full to the Department, that 50%, will be distributed to the Band. I might add, as stated, in previous correspondence, that the property described

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[73] Crawford to Goodison, April 1, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 289-90).

[74] Paul to Scott, April 1, 1927 (ICC Document, p. 292).

> in this surrender, is white drifting sand, being worthless, for agricultural purposes.[75]

It seems one Maurice George was not present at the General Council even though he is shown in the Agent's poll book as having voted in favour of the surrender.

Maurice George's affidavit states he had intended to vote against the sale even though he believed those voting voted in favour would receive $10. He did not make it to the meeting because his car broke down near Forest, Ontario, six miles south of the reserve. About 5:30 p.m. the day of the vote, Mr George was "accosted" on the street in Forest by Agent Paul and prospective purchaser Crawford who asked him how he wished to vote. At Mr George's request, Mr Paul showed him the list of voters indicating 26 had voted for the sale, including Caleb Shawkeence. George was "induced to vote in favour of the sale by reason of the expected payment of money . . . and by reason of seeing Mr Caleb Shawkeence's name on the list of those who had voted in favour of the sale." When Mr George informed the Agent that he wished to vote in favour, Mr Crawford handed him $5 – not $10 or $15 – for his vote.[76]

The Chief, John Milliken, and Mr Crawford had been most anxious for the vote to be taken without delay.[77] Two months before the vote, Cornelius Shawanoo, a former Chief of the Band, had written headquarters to protest the imminent

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[75] Paul to Scott, April 1, 1927 (ICC Documents, p. 291).

[76] Affidavit of Maurice George, April 14, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 304-06).

[77] Paul to McLean, February 2, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 258); J. Milliken to Indian Affairs, February 11, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 260).

General Council being called by Agent Paul. In Mr Shawanoo's opinion, "half breeds and American Potawatomies" should not be allowed to vote for sales or leases unless the "Original members" decided to have the General Council.[78] Agent Paul felt correspondence such as Mr Shawanoo's "should be ignored," because "it would be impossible, to have [the 'half breeds and American Potawatomies'] removed as members."[79]

Just before the vote was taken, Mr Shawanoo complained to headquarters that Paul had told "one of the Indians if the Indians refuse to sell that the Dept will sell it just the same and the supposed byer promise [sic] to pay $10.00 each of those who will go to the meeting on the 30th I suppose those in favor of the sale." Acknowledging that the "Original members" were in the minority, Mr Shawanoo concluded, "it is positively no use for us to try & stop the land sale." He implored the department to stop the March 30, 1927, General Council, "called up by our Indian Agent without the Council passing a resolution or without the Original members consent."[80] Finally, he asked for clarification of the status of those whose ancestors were not party to the treaty that established the Band's reserves:

> Who is the Original member on Indian Reserve. Does those decendents of the first Indians that settled on parcel of ground have improvements on already when the Reserve was first set apart or those that came in

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[78] C. Shawanoo to Indian Affairs, January 26, 1927 (ICC Documents, pp. 255-57).

[79] Paul to McLean, February 9, 1927 (ICC Documents, p. 259).

[80] Shawanoo to Indian Affairs, March 21, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 272-75).

> afterward as Visitors between 50 & 70 year ago. We want a full understanding of this.[81]

Mr Caldwell forwarded Mr Shawanoo's correspondence to Agent Paul on March 29, 1927, and ordered him to submit his views to headquarters.[82]

After the March 30, 1927, vote, Shawanoo's group asked that the sale be stayed.

> We would appreciate the Department's ruling as to whether it will be necessary for us to resort to judicial remedies to stay the sale . . . or whether the Department has exclusive jurisdiction in matters of this kind and has power itself to order an enquiry upon proper cause being shown.[83]

An investigation into allegations of bribery and fraud was being sought by their counsel who produced the affidavit of Maurice George[84] and put forward other examples of bribery:

> That Mr. Crawford paid to each Indian voter in advance of the general Council meeting in question, the sum of $5.00 for the purpose of inducing them to vote in favour of the sale. He promised them in

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[81] Shawanoo to Indian Affairs, March 21, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 272-75).

[82] Caldwell to Paul, March 29, 1927, NA, RG 10, vol. 7794, file 29029-2 [?] (ICC Documents, p. 276).

[83] McEvoy & Henderson, Barristers & Solicitors, London, Ont., to Superintendent General, Indian Affairs, April 4, 1927, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, p. 293).

[84] Scott to McEvoy & Henderson, April 7, 1927, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, p. 294).

> addition the sum of $10.00 after they had cast their vote in favour of the sale, and the said $10.00 was paid by him to the voters who voted in favour of the sale, and the said sum was not paid to those who voted against the sale. In one instance, in the course of the general Council meeting itself, Mr. Caleb Shawkeence was handed a $5.00 bill by Mr. Crawford to overcome the resistance he was manifesting to the sale, and by reason of the said payment he was induced to and did vote in favour of the sale. Another young man, Mr. Wilfred Shawkeence, was tendered the sum of $5.00 by Mr. Crawford in advance of the meeting to vote in favour of the sale. He refused the money and did not vote in favour of the sale, and accordingly did not receive any money after the sale.[85]

Counsel charged there had been "an unconscientious use of bargaining power amounting in law to undue influence" which should render the transaction "legally invalid" given the relative position of "a white land agent bargaining with Indians."[86]

Mr Shawanoo also pointed to the circumstances of Maurice George's vote. He complained about the extra payments too, an immediate consequence of which had been "a big time" resulting in drunkenness, a fight over the vote, arrests, and at least one fine. "We (Shawanoos) number only ten members," he wrote, "and there are about five or six other persons on our side who know no rights are given to us after the changing of (Half-breed) the Chief and Councillors or better known

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[85] McEvoy & Henderson to Deputy Superintendent General, Indian Affairs, April 13, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 301-03).

[86] McEvoy & Henderson to Deputy Superintendent General, Indian Affairs, April 13, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 301-03).

Pottowatomies." Unable to get a reply to his letters, Shawanoo nevertheless reiterated his counsel's request for a list of voters' names.[87]

The Department rejected any suggestion that the circumstances of the vote should invalidate the March 30, 1927, release. On April 26, 1927, J.D. McLean, Acting Deputy Superintendent General of Indian Affairs, advised counsel that the Department had "investigated the whole matter thoroughly" and had found "the surrender was given in a proper and legal manner." Cash payments "were made on the specific request of the Indians themselves, and were entirely independent of the consideration involved in the surrender."[88]

When this response was made, Mr Goodison was assured by Mr Caldwell that consummation of the sale was in process.[89] But the protesters wanted court action.[90] Their counsel met with Deputy Superintendent General D.C. Scott on May 7, 1927, to "demand an open court of Enquiry."[91] At that meeting, counsel submitted an affidavit from Isaac Shawnoo, which asserted that cash payments had determined the outcome of the vote:

> I was informed about two weeks prior to . . . March 30th, 1927, that I would receive the sum of ten dollars at the said meeting, if I voted in favour of the surrender . . . and that I would receive no money if I

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87 C. Shawanoo to Indian Affairs, April 11, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 295-300).

88 McLean to McEvoy & Henderson, April 26, 1927 (ICC Documents, p. 308).

89 Caldwell, Lands & Timber, Indian Affairs, to Goodison, MP, April 27, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 309).

90 J.R. Stirrett, McEvoy & Henderson, to J.D. McLean, April 30, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 314).

91 J.R. Stirrett to Scott, May 7, 1927 (ICC Documents, p. 318).

> voted against the said surrender. . . . the following four Indians, among others, would not have voted in favour of the sale, except for their being paid the sum of five dollars, in order to vote in favour of the said Surrender: Maurice George, John Elijah, Caleb Shawkeence and Wellington Elijah. . . . without the aforesaid four votes, there would not have been a sufficient majority in favour of the said Surrender.[92]

Asserting that the evidence "unquestionably constitute[d] a 'prima facie' case of fraud, invalidating the transaction," counsel pointed out "this is a matter of law and can only be properly passed upon by a competent legal authority."[93]

No formal court action or open court of inquiry ever transpired until this Commission inquiry.

Community Session Evidence, 1995

In the course of inquiring into the rejection of a specific claim by Indian Affairs, the Commission's practice is to hold at least one information-gathering session in the community whenever possible. In this way, individual members of the First Nation are able and are encouraged to provide their recollections and impressions directly to the Commission. The community session on the Kettle Point Surrender Claim was held at the Kettle Point Reserve on March 8, 1995. In this case, since the surrender vote had occurred 68 years earlier, none of the voters was available to recall the event. Those of the Chippewas of Kettle and Stony Point First Nation who did speak volunteered to describe what they had observed or had been told.

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92 Affidavit, Isaac Shawnoo, May 7, 1927 (ICC Documents, p. 317).

93 J.R. Stirrett to Scott, May 7, 1927 (ICC Documents, p. 318).

Rachel (née Henry) Shawkence, wife of Baxter Shawkence, was born at Stony Point on April 19, 1909. She was almost 18 years old and keeping house for Chief Sam Bressette and his wife (her Aunt Jessie) when the vote was taken. Although she never discussed the vote with the Chief, Rachel described some aspects of reserve life and commented on the vote.[94]

Rachel Shawkence said Lake Huron was "like a lion," unpredictable and capable of great destruction. When a storm sank five boats in the winter of 1913, her brother, James Henry, picked the dead bodies up off the shore and transported them to Forest. "Nobody can claim that lake front," she asserted, "it belongs to the lake." She said the people on the reserve spoke in Indian in 1927; they spoke mostly Ojibway [Chippewa] and Pottowatomie, not English. Women at Kettle Point and Stony Point worked hard in those days. They sold baskets to buy food while their husbands hunted.[95]

"[B]ecause we didn't have no money coming in. There were no – no money from the government," Rachel Shawkence said, the Chief decided to sell the land:

> . . . Chief Sam Bressette said we'll sell that piece of land and we'll get money and we'll have some money. And then they had the votes, to see how many wanted to sell the land. They were short of votes, and they made up their mind to buy some votes. They would pay them five dollars, and then after the land was sold, they would pay them the rest of the $10.00, because some people didn't want to sell that land. They didn't want to part (sic) it, because it's a reserve, and you can't sell reserve land. It's very special land. It's sacred.[96]

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94 ICC Transcript, March 8, 1995, pp. 18, 22 (Rachel Shawkence).

95 ICC Transcript, March 8, 1995, pp. 19, 20, 80 (Rachel Shawkence).

96 ICC Transcript, March 8, 1995, pp. 20-21 (Rachel Shawkence).

The people against selling the land, such as the Shawkences and Greenbirds, were attached to the land partly because it was a beautiful place to go in the summer. Rachel Shawkence thought the five dollars was payment for a Band member's vote. She mentioned that her father, a well-digger named Gifford Henry who had moved to Kettle Point from Stony Point in 1926, was not member of the Band member when the vote occurred:

> He was supposed to be but their – the Council brought in other strange people and they voted against my father. But my father's mother was a strong member of both Kettle Point and Stony Point. Her name was Elizabeth George.[97]

Rachel Shawkence did not recall hearing about people receiving $10 payments afterwards, "[b]ut I know they were all dressed up and had new coats on," she said. Rachel Shawkence attributed the outcome of the vote to actions of the Chief. There was organized opposition to selling the land but "the Chief bought voters and I don't know who they are," she said.[98]

Angeline Shawkence was just three years old in 1927, the daughter of Edgar Shahnoo and the granddaughter of Cornelius Shahnoo [Shawanoo]. Asked whether she had been told that money influenced the vote, she said:

> That's what they spoke about all the time. They just chuckled about some of those things, how some of them were suckered into doing things, you know. They just went ahead and did those things for the five dollars, and they had no business doing it though. Our Indian agents were, they were not very nice men. They didn't care for us like,

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[97] ICC Transcript, March 8, 1995, pp. 26, 22, 25 (Rachel Shawkence).

[98] ICC Transcript, March 8, 1995, pp. 27, 28 (Rachel Shawkence).

> you know, as long as they went and did what was pleasing to them. They didn't listen to us.[99]

Angeline Shawkence had been told that those who disagreed with selling the land did not attend the meeting to vote on the surrender. Her Aunt Laura told her that grandfather Cornelius was so saddened "when that land down the beach there was taken away, sold on them" that he "was just walking around crying how sad he was over what took place." Her aunt was angry about the vote; Laura used to say that all she got was $5 to buy a broom.[100]

In 1927, $5 was twice the monthly relief allowance. Charles Shawkence, former chief and son of Rachel, elaborated on what $5 or $10 represented:

> There was no welfare system like we have today. It was called charity. . . . We were given $2.00 and a half a month. That is what they allowed for charity. Two dollars ($2.00) and a half a month is no welfare, it was called charity. And you think about the offer that was made, $5.00 to vote. Like these real estate men or whoever paid the money to get the money to these Indians to vote, that was like two months welfare. And when you put the $10.00 after they got paid for vote, that's like six months welfare. You have to imagine that. Just, if you were in their shoes, didn't have no money, that's a hell of a pile of money. You're just being enticed into it . . .[101]

Two or three years before the 1927 vote, Charles's uncle Wilfred, then a teenager, was hunting muskrats with his father, Wesley, in the swamp just south of the land in question. Wilfred and Wesley overheard a conversation between the

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99 ICC Transcript, March 8, 1995, pp. 27, 83 (Angeline Shawkence).

100 ICC Transcript, March 8, 1995, pp. 28, 29, 33 (Angeline Shawkence).

101 ICC Transcript, March 8, 1995, pp. 45-46 (Charles Shawkence).

Indian Agent and Mr Crawford who, according to Wilfred and Charles, were plotting to acquire the land:

> Along on the trail from the real estate man, this Mr. Crawford and the Indian agent, I believe his name was Thomas Pull at the time, they were talking. And they didn't see us sitting in the bush, but they were saying: "We have to get this land away from the Indians."[102]

During the course of the the Commission inquiry, no evidence was submitted to suggest that the members of the Band were living in anything but poverty. Those who spoke at the community session had various ways of describing how "tough" times were on the reserve.[103] For Earl Bressette, born in November 1923, recalling his childhood there was to remember many hardships:

> We never had shoes to wear, we didn't have blankets to put on our bed and – we had a hardship, we had a hard time. And there's many, many times we had no food to eat. I can recall when we were just growing up my dad used to go down and take his fishing rod and his line and go out and get fish for breakfast. And that's what we had for our breakfast, we had fish for breakfast. Well, comes dinner time he isn't working any place, we got the same kind of food, fish for dinner. It went on for that for, all during the spring, because you couldn't find a job, or if there was any jobs to get, they were so scarce, scarce as hen's teeth. So we managed to survive.
>
> And I recall another time, we had no food to put on our table and my dad had one shell. That was a hard time. And the shell was just a little bit of money but nevertheless you couldn't by a shell, because things were so hard. It was a hard time to live. So he went back and

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102 ICC Transcript, March 8, 1995, pp. 51, 52 (Charles Shawkence).

103 ICC Transcript, March 8, 1995, p. 42 (Charles Shawkence).

killed a rabbit, this is the winter time. I didn't finished speaking about the summer time when things were more prosperous.

My dad was a guide, fishing guide, and he would take people to, he'd guide them out in the fishing grounds. And he made, what he made in that summer, that had to keep us until the winter and that wasn't very much. We never had no rubbers to put on, we hardly had any clothes to wear, we had no blanketing to put on our beds. The funniest part of it we would gather all the coats and the sweaters and everything that we could use for a blanket. And we had a big square rug we put on the floor. The last thing we'd do is we'd pick up that rug and throw it on top of the bed and that was our cover. That had all the coats and everything else together. That's the hardships that we had growing up as children.[104]

Bonnie Bressette, daughter of Bruce and Hilda George, lived with her grandfather Maurice George when she was growing up. She said he was the one "picked up" in Forest who then accepted money to vote in favour of the surrender. Her information was that her grandfather was picked up along with Caleb Shawkence.[105] At the beach, Bonnie's father used to tell her about how the land was lost and why he thought cottages did not belong there. Bonnie remembered her father saying he had been told that there had been a meeting in which the people had said "no." Then, "they went back and they paid them to vote." He told her: "They paid people to vote when people really needed that money, and they were so broke, and they were hungry, and they were having such a hard time."[106]

Chief Thomas Bressette told the Commission that an elder had told him that he had seen an individual walking around the March 30, 1927, meeting paying

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104 ICC Transcript, March 8, 1995, pp. 99-100, 114 (Earl Bressette).

105 ICC Transcript, March 8, 1995, p. 127 (Bonnie Bressette).

106 ICC Transcript, March 8, 1995, p. 131 (Bonnie Bressette).

people to vote saying, "Here, take $5.00 to vote."[107] The late elder's point was that "somebody was paying somebody to vote, somebody was in a meeting that didn't belong there, that had no business being in a general Band Council meeting . . ." Chief Bressette said the person was "a real estate agent" named Crawford whose "subsequent correspondence reiterates a fact, we, [the Band] tried to buy the land."[108]

Charles Shawkence also characterized Crawford as a real estate agent. He considered it important to draw attention to Crawford's April 1, 1927, letter to Goodison – the letter in which Crawford not only assured Mr Goodison that *all* band members would "get their bonus just the same as the ones that did vote" and in which Crawford explained that he had gone to the Chief and councillors' homes the next day to get a surrender paper signed.[109] At the March 8, 1995, community session, Mr Shawkence was indignant about these circumstances:

> What business does a real estate agent have to go to a member of parliament? He has no business doing a thing like this. It should have been the Indian Agent, taking a piece of surrender paper to take to the Chief. This Crawford interfered with the rules of procedure when he sold that. Here's a, here's a piece of paper where the Indian agent, or the Crawford, the purchaser, went, wrote to Mr. Goodison, a member of parliament. He had no damn business doing it, none whatsoever. That's – I think is, should be taken very – take a hard look at it . . .[110]

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107 ICC Transcript, March 8, 1995, p. 120 (Chief Thomas Bressette).

108 ICC Transcript, March 8, 1995, pp. 122, 124 (Chief Thomas Bressette).

109 Crawford to Goodison, April 1, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 289-300).

110 ICC Transcript, March 8, 1995, p. 67 (Charles Shawkence).

POST-VOTE EVENTS

Indian Affairs Ignores Protests, 1927-29

Indian Affairs did not want any opposition to the Kettle Point surrender to affect the sale of the lands.[111] After the Privy Council accepted the surrender on May 11, 1927,[112] J.D. McLean, acting for the Deputy Superintendent General, wrote a lengthy memorandum to the Minister, Charles Stewart, in which he attempted to dispel the notion that the cash payments had been bribes:

> Mr. Goodison [the local MP], who is interested in the matter on behalf of Mr. Crawford, had several conversations in the matter with Mr. Caldwell, of our Lands Branch . . . and he confirmed statements since made by both Mr. Crawford and our local Agent Mr. Paul. The original offer made by Mr. Crawford was a price of $85.00 per acre, cash, for a parcel containing 83 acres. . . . in some preliminary discussion which Mr. Crawford had with members of the Band, prior to the meeting held for the purpose of considering the surrender, a demand was made on him for the payment of an additional cash bonus of $15.00 per head, payable to each voting member of the Band whether in favour of or against the sale.
>
> Mr. Crawford agreed to pay this amount rather than have the sale held up, and while he has suggested that in this case the figure stated in the surrender should be $100 per acre, the Indians refused to have the transaction completed in this way, claiming that they needed the extra money for their own personal use. . . .
>
> . . . [Crawford] agreed to make this [$15.00] payment on the specific demand of the Indians themselves, and on the condition that all voting members of the Band would benefit alike whether in favour of or opposed to the sale. The Indians demanded this payment from

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111 McLean to Paul, May 12, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 321).

112 Order in Council 842, May 11, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 319).

> Mr. Crawford, apparently very plainly indicating that unless it was made the surrender would be refused.
>
> The payment of a cash bonus to members of a Band upon the occasion of granting a surrender is a common practice with the Department, and very rarely is it possible to secure the release of Indians lands for sale except a considerable cash distribution is made at the time, and such distribution has never before been considered in any way as a bribe or special inducement.
>
> The surrender as granted recently by a majority of the voting members of the Kettle Point Band has been approved by an Order of His Excellency the Governor General in Council dated the 11th instant, and I see no reason why the completion of the sale to Mr. Crawford should not be made . . .
>
> . . . Mr. Stirrett, . . . visited your office . . . [and] submitted an affidavit from a young member of the Band. . . . I do not believe that the affidavit is correct. In any case, there is an ulterior motive behind the opposition. This young man is one of two or three members of the opposing party, who have recently applied to the Department to be located for lots which are involved in the present transaction. The land which Mr. Crawford is purchasing is utterly useless for agricultural purposes, being drifting sand, and it is obvious that these young men only desired to secure possession of these lots in order that they might resell for similar purpose for Mr. Crawford intends to use the property. Even had Mr. Crawford's application to purchase not been received, the Department would have certainly refused the applications. The land is exceptionally valuable from a Band standpoint, and any benefits accruing should go to the Band in general, and not to any individual members.[113]

McLean informed the Minister that "we consider the transaction bona fide in every respect and fully meeting the provisions of the Indian Act with respect to the

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[113] McLean, Acting Deputy Superintendent General, to Superintendent General, May 19, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 322-24).

surrender and sale of Indian lands." On May 19, 1927, McLean recommended "completing the transfer" of this valuable land to Mr Crawford.[114]

McLean's memorandum was forwarded to Goodison by Minister Stewart with a "Personal" note that read:

> The transfer will now go through: I think, however, it would be well for you to make it clear to Mr. Crawford that he must see that the members of the Band receive the $15 per head promised them, in addition to the $85 per acre.[115]

The Minister of Indian Affairs thus advised Goodison on how Crawford should rectify any impression that votes were being bought. Marginalia on a copy of the Minister's note reads: "Mr. Stewart instructed Mr. Caldwell by phone to complete transfer"; and, "$7055.00."[116] Accordingly, Mr Paul was asked to "forward the purchase price to the Department at the earliest possible date."[117]

The "Original Members" or "Treaty Indians" of the Band, protested the impending sale for two years. They insisted that a majority of the voters had not been entitled to vote because they were not descendants of signatories to the 1827 treaty. Some 17 letters from Cornelius Shawanoo, Mrs Elijah Ashquabe (née Lucy Ann Pewaush), Beattie Greenbird, Steven Shawkence, Mrs Sophia Shaw[a]noo

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[114] McLean, Acting Deputy Superintendent General, to Superintendent General, May 19, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 322-24).

[115] Minister of Interior to Goodison, MP, May 27, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 325).

[116] Minister of Interior to Goodison, MP, May 27, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 325).

[117] J.C. Caldwell to Agent Paul, June 4, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 327).

(widow of Amos Shawanoo and mother of Elliott Shawanoo), and Mrs B. Greenbird opposing the surrender were either dismissed or ignored by Indian Affairs.[118]

The extent to which the nine non-voting men - Elijah Ashquabe, Elliott Shawanoo, Peter Cloud, Sutton Shawkence, Telford Bressette, Frank George, David Shawnoo, Wesley Shawkence, and Elijah Southwind - supported this prolonged post-vote protest is not apparent from the available documents.[119] In 1923, however, Elliot Shaw[a]noo and David Shawnoo had signed a letter deploring the efforts of "Potawatomis and half Breeds" to lease land at Kettle Point.[120]

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[118] Ashquabe to Charles Stewart, Minister, June 14, 1927 (ICC Documents, pp. 328-31); Ashquabe to Charles Stewart, Minister, June 15, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 332-33); McLean to Ashquabe, June 23, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 334); Ashquabe to Charles Stewart, Minister, June 29, 1927 (ICC Documents, pp. 335-38); McLean to Ashquabe, November 2, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 353); Ashquabe to Indian Affairs, October 29, 1927 (ICC Documents, pp. 349-51); Chadwick to Indian Affairs, February 16, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 507); Cornelius Shawnoo to A.C. Chadwick, National Defence, February 11, 1928 (ICC Documents, pp. 356-64); Ashquabe to Corporal Corless, RCMP, Sarnia, July 20, 1929 (ICC Documents, pp. 584-87); Ashquabe to Indian Affairs, April 3, 1929 (ICC Documents, pp. 517-22); Ashquabe to Indian Affairs, April 12, 1929 (ICC Documents, pp. 524-26); Ashquabe to Indian Affairs, May 6, 1929 (ICC Documents, pp. 534-36); Ashquabe to Indian Affairs, May 27, 1929 (ICC Documents, p. 556); Ashquabe to Corporal Coreless, August 21, 1929 (ICC Documents, pp. 608-12); Ashquabe to Corporal Corless, RCMP, Sarnia, July 20, 1929 (ICC Documents, pp. 584-87); Stephen Shawkence to Indian Affairs, June 29, 1928 (ICC Documents, pp. 381-86); E.G. Moorhouse to Indian Affairs, December 26, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 464); Cornelius Shawanoo to Superintendent General, Indian Affairs, ca January 16, 1929 (ICC Documents, pp. 488-97); Mrs. Shawnoo & Mrs. Greenbird, December 29, 1928, NA, RG 10, vol. 3213, file 530120 (ICC Documents, pp. 465-75); J.D. McLean to Mrs. Sophia Shawanoo, January 15, 1929 (ICC Documents, p. 486); J.D. McLean to Mrs. Beattie Greenbird, January 15, 1929 (ICC Documents, p. 487); Cornelius Shawanoo to Charles Stewart, Minister of Interior, January 4, 1929 (ICC Documents, pp. 476-83); and J.D. McLean to Cornelius Shawanoo, January 8, 1929 (ICC Documents, p. 485); and Beattie Greenbird to Indian Affairs, May 13, 1929 (ICC Documents, pp. 542-50).

[119] Poll Book, March 30, 1927, NA, RG 10, vol. 7794, file 29029-02 (ICC Documents, pp. 285-87).

[120] Caleb Shawkence et al. to Indian Affairs, October 13, 1923, NA, RG 10, vol.

Crawford Fails to Pay, 1927–28

Mr Crawford did not have $7,055 to buy the Kettle Point land surrendered for sale specifically to him.[121] His explanation was that someone had reneged on a prior agreement to loan him the money. Seven months after the vote, when Indian Affairs questioned his intentions, Crawford appealed for more time but also acknowledged that the land might have to be returned to the Band.[122] On November 18, 1927, he wrote Assistant Deputy and Secretary J.D. McLean:

> [I]f it can stand for a few months I am quite sure I will be able to pay for it. If not we will have to let it go back to the Indians. But we have not did [sic] the Indians any harm as they have had about $700.00 out of it. And we are out about twice that amount.
>
> I realize that the Indians have been bothering you a great deal as they have been me, for which I am very sorry for.[123]

Seven more months passed without payment. Both Crawford and Goodison seemed oblivious to the Band's concerns. While Crawford apologized to McLean, Goodison felt it necessary to apologize directly to Caldwell:

> I am very sorry indeed that [the Kettle Point sale] did not pan out as we expected. The Indians are ahead, by the money that Mr. Crawford

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8016, file 471/32-8-44-11 (ICC Documents, pp. 179-81).

121 J. D. McLean, Asst. Deputy & Secretary, Indian Affairs, Ottawa, to A. Mackenzie Crawford, Sarnia, November 2, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 352).

122 A.M. Crawford to Indian Affairs, November 18, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 354-55).

123 A. M. Crawford to Indian Affairs, November 18, 1927, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 354-55).

> gave each one of them, and he is out himself considerably over $1,000. He was acting in good faith when he applied but he had a misfortune in regard to a farm he had taken over and it took all his spare cash at that time.[124]

Whatever the original expectations were, by the summer of 1928 there was still no indication that Mr Crawford would be able to complete the transaction.

Band Council Demands Payment, August 1928

Band elections in June 1928 brought in Sam Bressette as Chief and Maurice George and John Elijah as councillors, the first two having been councillors at the time of the surrender vote.[125] In August 1928 the new Chief and Council wrote directly to Mr Crawford demanding immediate payment. Since a year and a half had passed since the vote, they threatened to cancel the Kettle Point surrender:

> You are hereby requested to make the payment on the piece of land we have surrendered to you on March 30th 1926 [sic] within thirty days if you are unable to meet payment by then the agreement will be

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[124] Goodison to Caldwell, June 18, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 375). If only the 39 individuals in the Agent's March 30, 1927, poll book received $15 from Crawford, then Crawford would have been "out" just $585. Paying each of the 44 eligible voters $15 produces a total of $660, an amount that was not refunded on January 7, 1929, or on May 4, 1929, when payment was returned to LeSueur and Dawson.

[125] Paul to McLean, June 22, 1928, NA, RG 10, vol. 7929, file 32-29 (ICC Documents, p. 379). The vote for Chief was 24 for Sam Bressette and 13 for Caleb Shawkence. The vote for two councillors was 24 for Maurice George, 21 for John Elijah, 16 for Joseph Johnson, and 13 for Alfred Greenbird. Judging from the Agent's Poll Book, there was only one Morris or Maurice George of eligible voting age in the Band. "Poll Book, March 1927," NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 285-87), and Copy of Poll Book, March 30, 1927 (ICC Documents, p. 288).

> withdrawn. We have been anxiously waiting for this for a long time, so please consider the matter at once.[126]

Two months passed before there was any documented response. Strategies employed by the purchasers to overcome Crawford's lack of money contributed to confusion and delay to the extent that it was more than another year before payment was credited to the Band's trust fund or distributed to individual members. In the end, the Band's receipt of money for the Kettle Point lands became contingent on the Department's receipt of money for the sale of surrendered Stony Point lands.

Stony Point Surrender, October 1928

Lack of success at Kettle Point did not deter Mr Goodison from involving himself in a similar lakefront surrender at Stony Point in 1928. Although the particulars of the October 12, 1928, surrender of Stony Point lands are beyond the scope of this inquiry, the timing of events cannot be ignored. Why was the Band's receipt of money from the sale of the Kettle Point so closely associated with activity related to the sale of Stony Point lands? Was it only for administrative convenience that Indian Affairs found it necessary to close the two transactions simultaneously? Whatever the reasons, documents pertaining to the closure of the Kettle Point sale often include references to the Stony Point purchase being made by a Mr W.J. Scott, Manager, Sarnia Locators, Real Estate and Business Sellers.[127]

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126 Chief Sam Bressette, Morris George, and John Elijah to A.M. Crawford, August 9, 1928 (ICC Documents, p. 397).

127 W.J. Scott to Indian Affairs, June 7, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 369).

The surrenders and sales at Kettle Point and Stony Point invite comparison. To prepare for the Stony Point surrender W.J. Scott approached the Indians directly before the vote.[128] Agent Paul supported the bids from Mr Crawford and Mr Scott, both of whom were assisted in their dealings with the Department by Member of Parliament Goodison. Goodison's successor as Member of Parliament, Ross Gray, forwarded the money to purchase both the Kettle Point and Stony Point lands to the Department and he also influenced the wording of the patents to Crawford and White and to Scott.[129] Both Mr Goodison and Mr Gray corresponded extensively with Mr Caldwell of the Lands and Timber Branch, but they wrote few, if any, letters to the Deputy Superintendent General's office.[130]

As in the Kettle Point surrender, the affidavit of execution was improperly completed by the Indian Agent for the Stony Point surrender. The difference was that headquarters returned the Stony Point surrender documents to Mr Paul "with new copies of affidavit attached, which you will be good enough to have signed by yourself and the Chief and Councillors, and sworn to before a Justice of the Peace or other person authorized to take an affidavit."[131]

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[128] Goodison to Caldwell, June 18, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 375).

[129] Gray to Caldwell, May 7, 1929 (ICC Documents, p. 538); Gray to Caldwell, May 30, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 560-61); Dawson to Gray, MP, June 5, 1929 (ICC Documents, p. 563); LeSueur, LeSueur & Dawson to Gray, MP, June 6, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 565); Gray to Caldwell, July 11, 1929, NA, RG 10, vol. 7794, file 29029-2, and marginalia (ICC Documents, p. 581); and Gray to Caldwell, July 23, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 588).

[130] On the subjects of the Kettle Point and Stony Point sales, Goodison and Gray each had about a dozen written exchanges with Caldwell between March 11, 1927, and June, 23, 1928, and May 7, 1929, and September 9, 1929, respectively.

[131] J.D. McLean to Thomas Paul, October 16, 1928, NA, RG 10, vol. 7794, file

Conditional Payment and "Flip," October 1928

The Band's 30-day deadline had long passed when, on October 13, 1928 – the day after the Stony Point surrender – the firm of LeSueur, LeSueur and Dawson sent a cheque for $7,055 for the Kettle Point lands to Agent Paul. Conditions attached to cashing this cheque point clearly to the plan to immediately sell or "flip" the lands at a much higher price. The sender explained that the cheque was payable only *after* a Crown grant made out to A. Mackenzie Crawford was delivered directly to the law firm:

> The reason for these conditions is that this money is a portion of the purchase price of a part of the lands being acquired by a subsequent purchase from Mr. Crawford, and it is paid on the understanding that the Deed will be obtained and registered in order that the title of the purchasers may be perfected.[132]

Mr Crawford lacked both the funds to buy the land and, of course, the Crown grant; therefore, "the closing of the purchase [was being] held up pending the obtaining of this document."[133] With the Crown grant, Mr Crawford would be able to raise the $7,055 or more.

Exactly how much more the initial purchaser(s) of the Kettle Point lands stood to gain is recorded in deeds to Lot 8 lands made out on October 13, 1928, the same day the conditional cheque was sent to Paul. The deeds are for eight transfers

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29029-2 (ICC Documents, p. 426).

132 LeSueur, LeSueur & Dawson to Thomas Paul, October 13, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 416).

133 LeSueur, LeSueur & Dawson to Thomas Paul, October 13, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 416).

of Lot 8 lands from joint owners A. Mackenzie Crawford and John A. White to eight individuals or couples who resided in the United States. How, when, or why John White became involved with Crawford is not explained in the documents that the Commission received but, at the very least, White was involved in the Kettle Point purchase as early as October 13, 1928. John A. White was associated with the John Goodison Thresher Company headed by Goodison, the Member of Parliament.[134]

Lot 8 contained 44 acres, or 53 per cent of the 81 acres surrendered. Crawford and White's cost to buy Lot 8 therefore amounted to about $3,800. Together, the American purchasers were paying a total of $13,200 for the lands, or almost three and a half times what Crawford and White were to pay. Their deeds, dated October 13, 1928, specified that the land they were buying included "all foreshore rights."[135] When they formally acquired the land a year later, these deeds

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[134] F.P. Dawson to J.C. Caldwell, January 30, 1929 (ICC Documents, pp. 498-99).

[135] Contracts dated October 13, 1928, with Harry P. Neal, merchant, & wife Goldie G., Smith's Creek, Michigan, $2,450 for easterly 490' of Lot 8, A (ICC Documents, p. 425); Henry Neal, merchant, Smith's Creek, Michigan, $2,450 for westerly 490' of easterly 980' of Lot 8, A (ICC Documents, p. 418); Charles F. Lambert, clerk, & wife Lillian, Smith's Creek, Michigan, $1,000 for westerly 200' of easterly 1,180' of Lot 8, A (ICC Documents, p. 419); James E. Wakefield, machinist, Port Huron, Michigan, $3,300 for westerly 660' of easterly 1,840 of Lot 8, A (ICC Documents, p. 420); Robert C. Morton, machinist, Detroit, Michigan, $1,000 for westerly 200' of easterly 2,040' of Lot 8, A (ICC Documents, p. 421); George H. Neal, contractor, & wife Alma, Detroit, Michigan, $1,000 for westerly 200' of easterly 2,240' of Lot 8, A (ICC Documents, p. 422); James Mackley, real estate dealer, & wife Jane, St Claire, Michigan, $1,000 for westerly 200' of easterly 2,240' of Lot 8, A (ICC Documents, p. 423); John A. Neal, machinist, & wife Rose, Toledo, Ohio, $1,000 for westerly 200' of easterly 2,640' of Lot 8, A (ICC Documents, p. 424). The description of the lots was based on "Plan of Indian Reservations at Kettle Point and Stony Point," June 20, 1900.

were recorded on September 20, 1929.[136]

Whether Indian Affairs headquarters was informed about the conditional aspect of the cheque sent by LeSueur and Dawson is not apparent from the correspondence, but Chief Bressette wrote headquarters just three days later asking if "Mr. Crawford's claim" could be cancelled:

> it is some fifteen months or more [17.5 months] since the sale [surrender] was transacted, and we have been waiting on Mr. Crawford to settle up. In an interview with him a short time ago he promised to pay us interest for the time he has kept us waiting for our moneys . . . We would like to know if it would be possible to cancel Mr. Crawford's claim, as he is not fulfilling his promises to us."[137]

Before there was any action to cancel, Agent Paul sent J.D. McLean a receipt from the Bank of Montreal in Sarnia dated October 24, 1928, indicating it had received from Paul $7,055 "payment on land Kettle Point" which the bank had credited to the Receiver General's account.[138] There was no explanation of the source of this money other than Paul's statement: "I am inclosing [sic] letter, which speaks for itself, with respect to this surrender submitted by Messrs. LeSueur, LeSueur, and Dawson."[139] This may have been the firm's October 13 letter.[140]

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136 See footnote 179 in section Finalization of Price and Deeds for identification of the deeds registered by the township in 1929.

137 Chief Sam Bressette to Indian Affairs, Ottawa, November 16, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 440-41).

138 Receipt No. 595, Bank of Montreal, Sarnia, Ont., October 24, 1928 (ICC Documents, p. 433).

139 Thomas Paul to J.D. McLean, October 24, 1928 (ICC Documents, p. 432).

140 LeSueur, LeSueur & Dawson to Thomas Paul, October 13, 1928, NA, RG 10,

When the Chief learned that money had been sent in, he switched to pressing Indian Affairs headquarters for cash. His note requesting distribution was sent on November 29, 1928:

> I have been requested to write you by members of this reserve that they are getting impatient at the delay getting their monies from the Crawford sale of Kettle Point land. . . . There is no work here at present that will enable the Indians to make a living, and a distribution of this money would be of benefit at this time.[141]

Payment Returned, January 1929

On December 5, 1928, Caldwell wrote a memo to Deputy Superintendent General Scott on the surrendered Kettle Point lands. Therein Caldwell alluded to "some little difficulty in connection with this matter, as at the time Mr. Crawford apparently was not in a position to make payment as agreed upon." Caldwell failed to mention any restrictions on the money from LeSueur, LeSueur and Dawson; rather he informed Scott that Crawford had paid for the surrendered lands by writing: "Recently, however, Mr. Crawford forwarded to the Department through the local Agent, Mr. Paul, the sum of $7,055.00, being payment in full, and the Department is now, therefore, in a position to issue title to Mr. Crawford."

Goodison had passed away sometime after October 12, 1928. Nevertheless, Caldwell invoked Goodison's name when asking Deputy Superintendent General Scott for the patent:

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vol. 7794, file 29029-2 (ICC Documents, p. 416).

[141] Chief Samuel Bressette to Indian Affairs, November 29, 1928, NA, RG 10, vol. 7704, file 29029-2 (ICC Documents, pp. 443-44).

> As the Christmas season it at hand, I would recommend your approval of a distribution [to the Band] of one half of the amount received, and the completion of the transaction by the preparation and issue of a patent to Mr. Crawford. You will recall that the late Mr. W. T. Goodison, M.P., was interested in this matter on behalf of Crawford.[142]

On December 7, 1928, headquarters did supply Paul with $3,527.50 (half the purchase price of $7,055.00) to distribute to individual band members. From the $3,527.50, J.D. McLean directed the Agent to "make as big collection as possible" on amounts Indians owed on loans.[143]

Neither the distribution nor the collection on loans occurred before Christmas 1928 because Chief Sam Bressette found the payment insufficient. His December 18, 1928, telegram to the Minister and Caldwell read: "Please cancel our surrender of lands to Mackenzie Crawford. He won't pay us any interest and can now sell land for more money."[144]

Even though the Chief knew the lands could be sold for more,[145] Deputy Superintendent General Scott considered Crawford's price "satisfactory." Instead of addressing the issue of price, Scott was prepared to cancel the sale for the reason that Crawford had failed to pay within a reasonable period of time:

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142 Caldwell to Deputy Superintendent General, December 5, 1928 (ICC Documents, p. 445).

143 J.D. McLean to Thomas Paul, December 7, 1928, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 448).

144 Chief Sam Bressette to Charles Stewart, Superintendent General, Indian Affairs, December 18, 1928 (ICC Documents, p. 452), and Chief Sam Bressette to J.C. Caldwell, Indian Affairs, December 18, 1928 (ICC Documents, p. 451).

145 McLean to Paul, December 17, 1928 (ICC Documents, p. 450).

> [I]f it is the wish of the Band that this sale should not be completed we are in a position to refund the amount paid by Mr. Crawford, as the long delay in handing over the purchase price would be sufficient cause for refusing to proceed further with the matter.[146]

On January 7, 1929, Indian Affairs sent a departmental cheque for $7,055 to LeSueur, LeSueur and Dawson with the advice that the matter be dropped:

> It is unfortunate that Mr. Crawford delayed so long in making payment of this amount, and his action in this regard has resulted in a very definite change of attitude on the part of the Indian owners of this property, so much so, in fact, that they have definitely advised the Department that they will refuse to accept payment, and request that the transaction be cancelled. You will understand, of course, that the Department considers it would be very unwise to endeavour to proceed further with this matter in the face of such a very decided opposition on the part of the Band . . .[147]

This refund did not include the money for "cash bonuses" dispensed by Crawford.

Involvement of White, 1928 to January 1929

Crawford's counsel, F.P. Dawson, travelled to Ottawa in January 1929 to tell Caldwell that non-completion of the purchase was a "serious situation" that would likely produce an action for damages against the elderly Mr Crawford. As Mr Dawson put it, Crawford had "experienced some little difficulty in arranging to finance the purchase. However, he was able to obtain the assistance of some

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146 Scott, DSGIA, to Mr Pratt, December 19, 1928 (ICC Documents, p. 454).

147 J.D. McLean to LeSueur, LeSueur & Dawson, January 7, 1929 (ICC Documents, p. 484).

friends." On their instructions and on Goodison's assurance on October 12, 1928, "that the surrender would be completed so far as his knowledge went, [Dawson] made a binding contract respecting the matter and the money was forwarded to you to complete the purchase."[148]

In this meeting, Caldwell "intimated" to Dawson that he "had had a discussion of the situation with Mr. J.A. White . . . who is associated with the business of which Mr. Goodison was the head [the John Goodison Thresher Company of Sarnia] . . ." Moreover, Caldwell had suggested that "if Mr. White intimated to the Honourable Minister in charge . . . that he had no objection to the completion of the surrender, that it might be carried through . . ." Once he had met with Caldwell, Dawson sought out White in Sarnia.[149]

Shortly after Goodison's death and "acting in the interests of the late Mr. Goodison," White had indeed met with officials of the Department.[150] White therefore told Dawson that, if the Department "took from anything which he said that there might be an objection to the closing of the surrender that a wrong impression had been obtained. In fact, Mr. White assured [Dawson] that he would do nothing which would prevent the carrying out of the surrender or stand in its way." White was "prepared to write a letter along the lines suggested by [Caldwell]" but instead opted for a personal visit to Ottawa "to interview both the Minister and [Caldwell] regarding the situation." Dawson dictated this January 30,

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148 F.P. Dawson to J.C. Caldwell, January 30, 1929 (ICC Documents, pp. 498-99).

149 F.P. Dawson to J.C. Caldwell, January 30, 1929 (ICC Documents, pp. 498-99).

150 D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

1929, letter asking Caldwell to reconsider returning the money for Crawford's purchase in the presence of White.[151]

Crawford Pays Interest, March 1929

In March 1929, Chief Sam Bressette, ex-Chief John J. Milliken, and "witness" Thomas Paul sent a letter to the Minister stating that, if Crawford paid interest covering the period between the surrender and the sale, the "local Indians" would not object to "the completion of the surrender and the granting of the Patent."[152] By the time Acting Deputy Superintendent General McLean reviewed the situation for the Minister later in March 1929, Crawford already had paid $846.60 as 6 per cent interest to cover the period of the delay.

McLean opined: "there is no likelihood of the Band receiving any better price for these lands than that offered by Mr. Crawford." Since Crawford had "already expended quite a sum of money in the negotiations" and "[a]s the surrender was originally given for the purpose of selling the property to Mr. Crawford," McLean recommended that "the transaction be completed as originally intended."[153]

Exactly two years after the surrender vote, on March 30, 1929 – shortly before the overall economy was about to slide into the Great Depression – Chief Sam Bressette also indicated to the Minister that, since Crawford was paying interest, "we feel the sale should be completed." Chief Bressette pointed out that

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151 F.P. Dawson to J.C. Caldwell, January 30, 1929 (ICC Documents, pp. 498-99).

152 Chief Sam Bressette to Minister of Interior, March 11, 1929 (ICC Documents, p. 512).

153 McLean to Superintendent General, March 21, 1929 (ICC Documents, pp. 513-15).

the Indians were very short of funds and "the payment will greatly relieve the hardship now being suffered."[154]

Crawford Payment Returned, May 1929

The Crawford sale was referred for "approval" to Ross W. Gray, the new local Member of Parliament.[155] This referral introduced further complications, more delay, and, ultimately, it appeared to determine who bought the surrendered land. On learning of the involvement of Gray, Dawson wrote Caldwell to say Crawford's situation was becoming "so serious" that needed he to know Gray's "attitude" in a few days, before the end of April.[156]

McLean's curt reply to Dawson of May 4, 1929, was that "the Department now finds it impossible to approve of a sale of this property to Mr. Crawford." The $7,055.00 was returned to LeSueur, LeSueur and Dawson for a second time along with the $846.60 interest. Again, the only reason cited was "the difficulty which arose, caused particularly by the delay by Mr. Crawford in making the necessary payment."[157]

The firm of Cowan, Cowan and Gray, in which Member of Parliament Gray was a partner, suddenly took the lead in purchasing the surrendered Kettle Point lands.[158] Although White had given Dawson the impression that he would support

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154 Bressette to Superintendent General, March 30, 1929 (ICC Documents, p. 516).

155 Dawson to Caldwell, April 23, 1929 (ICC Documents, p. 532).

156 Dawson to Caldwell, April 23, 1929 (ICC Documents, p. 532).

157 McLean to LeSueur, LeSueur & Dawson, May 4, 1929 (ICC Documents, p. 533). The money was first returned to the firm in January 1929.

158 Gray, Cowan, Cowan & Gray, to Caldwell, July 11, 1929, NA, RG 10, vol.

completion of the sale to Crawford, White manoeuvred to obtain the Kettle Point lands exclusively for himself.[159] The strategy of Messrs White and Gray was to better Mr Crawford's offer.[160]

White's Higher Offer, May 1929

On May 7, 1929, just three days after the $7,901.60 ($7,055.00 + 846.60) was returned to LeSueur, LeSueur and Dawson, Gray submitted an offer of $9,200.00 ($113.58/acre for 81 acres) from John White to purchase the Kettle Point lands surrendered for sale to Crawford.[161] On the same day, Gray also sent Caldwell a conditional $13,500.00 for land being purchased by W.J. Scott at Stony Point Reserve.[162] Writing to Caldwell about Kettle Point on his House of Commons stationery, Mr Gray asked that White's "very good" offer "be submitted to the Indian Council as soon as possible."[163]

7794, file 290029-2 (ICC Documents, p. 581).

159 D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

160 D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

161 White to Indian Affairs, May 7, 1929 (ICC Documents, p. 537), and Gray, MP, to Caldwell, May 7, 1929 (ICC Documents, p. 541).

162 Gray to Caldwell, May 7, 1929 (ICC Documents, p. 538). The conditions attached to the $13,500.00 were: "As certain of this money is coming by way of a mortgage Company for whom we act, you will please not disburse any part of these funds until plan has been registered and patent granted to Scott as agreed between yourself and the writer last week." The $13,500.00 for Stony Point lands amounted to $35.81 per acre. Indian Affairs, Land Sale Ledger, May 7, 1929 (ICC Documents, p. 540).

163 Gray, MP, to Caldwell, May 7, 1929 (ICC Documents, p. 541); see also White to Indian Affairs, May 7, 1929 (ICC Documents, p.537).

Deputy Superintendent General Scott responded to this turn of events by acknowledging that the lands might be sold to White:

> Mr. White desires to secure possession of these lands and offers a price slightly in excess of that which the Indians agreed to accept from Mr. Crawford. It seems somewhat unfair to decline to complete the sale to Mr. Crawford; but I presume no other action is possible, considering the very definite stand which Mr. Gray, the present sitting member, has taken in the matter.[164]

Judging by Scott's remarks, we would conclude that Gray had a definite influence on departmental decision making, certainly more influence than that of Crawford, White, or the Band in this instance.

The Deputy Superintendent General believed selling the land to White would involve resubmitting the matter to the Band because the original vote was on Mr. Crawford's application. He therefore told the Minister that "a further surrender will have to be secured in connection with Mr. White's present application."[165] He also observed that there would be a need to return Crawford's cash payments:

> [W]hen Mr. Crawford was discussing this matter with the Indians they demanded from him a per capita cash payment of $15.00, which he paid, totalling $660.00. If Mr. Crawford's application is to be refused, in all fairness some arrangment should be made to refund to him this $660.00 at least.[166]

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[164] D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

[165] D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

[166] D.C. Scott to Superintendent General, May 20, 1929 (ICC Documents, pp. 552-53).

Mr White's higher offer was never brought to the attention of the Band.

Sale to Crawford and White, June 1929

Gray managed to circumvent the necessity of taking another surrender by bringing Crawford and White together on a deal that did not require any additional expenditure to obtain the land from the department. Gray accomplished this by sending two letters to Caldwell: one from Crawford instructing the "Indian Lands Department" to issue a deed jointly to Crawford and John White;[167] the other from White withdrawing his offer.[168] Neither of these letters, both dated May 30, 1929, state the purchase price. Gray left for Sarnia that night hoping "to have the money necessary to take up the surrender" on his return.[169] In the meantime, he asked Caldwell to ensure that "to the water's edge" was explicitly stated in the deed. Again writing on House of Commons letterhead, he directed:

> as in the case of the other surrender at Stoney Point . . . these deeds should describe the land both in the first parcel and second parcel as extending to the water's edge, then there can be no question about obtaining all of the land required.[170]

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167 Crawford to "The Indian Lands Department," May 21, 1929 (ICC Documents, p. 554).

168 White to Indian Affairs, May 25, 1929 (ICC Documents, p. 555).

169 Gray to Caldwell, May 30, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 560-61). As appears here, there is sometimes an "e" in the spelling of the name of the Stony Point Reserve.

170 Gray to Caldwell, May 30, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, pp. 560-61).

The $7,055.00 and $846.60 interest came back to Indian Affairs, this time through Gray who obtained it from Dawson. Dawson advised Gray that, even though the patent would be to Crawford and White, White must commit to carrying out the previously arranged sales:

> My understanding in connection with this matter is that a deed will issue from the Department of Indian Affairs, upon receipt of this sum, in the name of John A. White and A. Mackenzie Crawford, covering the surrendered land. As I previously advised you Mr. Crawford entered into binding agreements for the sale of the land and it is, therefore, necessary under the new arrangement that Mr. White agree, in writing, to carry out the sales so arranged.[171]

When the money was credited to "the proper account" at Indian Affairs, Caldwell noted that "$7500.00 is . . . the purchase price agreed upon."[172]

Finalization of Price and Deeds

Indian Affairs headquarters had prepared the surrender documents for an 81-acre surrender. Irrespective of the Order in Council of May 11, 1927, accepting the surrender of 83 rather than 81 acres at Kettle Point, headquarters considered there was an overpayment of $190.40 ($170.00 principal and $20.40 interest) because LeSueur, LeSueur and Dawson paid for 83 not 81 acres. This difference was refunded.[173] Taking this adjustment into consideration, the total on the Band's

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171 Dawson to Gray, MP, June 5, 1929 (ICC Documents, p. 563).

172 LeSueur, LeSueur & Dawson to Gray, MP, June 6, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 565); Caldwell to Accounts Branch, June 7, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 566).

173 Caldwell to Accountant, June 27, 1929, NA, RG 10, vol. 7794, file 29029-2

account for selling the Kettle Point lands was $7,706.20. That is, Indian Affairs' ledger indicated, at June 10, 1929, that "payment in full, Cash" had been made for 81 acres at Kettle Point at a rate of $85.00 per acre thus bringing the total amount of the sale to $6885.00 + 821.20 interest.[174]

The other matter left outstanding in finalizing the sale was that neither the patent for 81 acres at Kettle Point to White and Crawford nor the patent for 77 acres at Stony Point to Scott included the words "to the water's edge" as Gray had requested earlier for both deeds.[175] Gray returned them to Caldwell insisting that "together with the foreshore rights" be added to Crawford and White's and that "to the water's edge" be added to Scott's. Indian Affairs changed both to read: "together with all foreshore rights."[176] Of course, Gray accepted the Crawford and White patent with this change but he was not happy with the Scott patent. It was not until September 18, 1929 – after Indian Affairs found it necessary to threaten to cancel the Stony Point sale – that Gray finally accepted the wording on the Scott patent.[177]

(ICC Documents, pp. 577-78); LeSueur, LeSueur & Dawson to Secretary, Indian Affairs, July 10, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 580).

174 Indian Affairs, Ledger Sheet for Kettle & Stony Point, June 10, 1929 (ICC Documents, p. 568).

175 Description for Patent, Indian Affairs, June 25, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 574); Description for Patent, Indian Affairs, June 25, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 575).

176 Gray to Caldwell, July 11, 1929, NA, RG 10, vol. 7794, file 29029-2, and marginalia (ICC Documents, p. 581); Caldwell to Cowan, Cowan & Gray, July 18, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 582).

177 Gray to Caldwell, August 6, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 598); Robertson, Chief Surveyor, Indian Affairs, to Lands Branch, Indian Affairs, August 12, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 601);

Except for the Crown's "free use, passage and enjoyment of, in, over and upon all navigable waters," the 81 acres at Kettle Point, being "part and parcel of those set apart for the use of the Chippewas of Chenail Ecarts [sic] and St. Clair Band of Indians," were conveyed to John A. White, Salesman, and A. Mackenzie Crawford, Weigh Master, by the patent that Indian Affairs registered on June 27, 1929, and deposited in the Land Registry Office on August 13, 1929.[178]

The eight Lot 8 deeds, made out to the American buyers on October 13, 1928, and signed by Crawford and White in the presence of Dawson, were recorded by the Township on Bosanquet on September 20, 1929.[179] The 44 acres in Lot 8 at Kettle Point sold for an average price of $300 per acre, which is a profit of 253 per

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Gray to D.C. Scott, DSGIA, August 29, 1929 (ICC Documents, pp. 615-16); McLean to Gray, September 9, 1929 (ICC Documents, pp. 626-27); Gray to McLean, September 18, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 629).

[178] Crown Grant (Deed No. 15794, Township of Bosanquet) to White and Crawford, June 27, 1929 (ICC Documents, pp. 602-06).

[179] Deeds signed by A.M. Crawford and John A. White and their respective wives in the presence of F.P. Dawson, dated October 13, 1928, and recorded September 20, 1929; Deed No. 15810, Harry P. Neal, merchant, & wife Goldie G., Smith's Creek, Michigan, $2,450 for easterly 490' of Lot 8, A (ICC Documents, pp. 630-33); Deed No. 15811, Henry Neal, merchant, Smith's Creek, Michigan, $2,450 for westerly 490' of easterly 980' of Lot 8, A (ICC Documents, pp. 634-36); Deed No. 15812, Charles F. Lambert, clerk, & wife Lillian, Smith's Creek, Michigan, $1,000 for westerly 200' of easterly 1,180' of Lot 8, A (ICC Documents, pp. 637-39); Deed No. 15813, James E. Wakefield, machinist, Port Huron, Michigan, $3,300 for westerly 660' of easterly 1,840 of Lot 8, A (ICC Documents, pp. 640-43); Deed No. 15814, Robert C. Morton, machinist, Detroit, Michigan, $1,000 for westerly 200' of easterly 2,040' of Lot 8, A (ICC Documents, pp. 644-47); Deed No. 15815, George H. Neal, contractor, & wife Alma, Detroit, Michigan, $1,000 for westerly 200' of easterly 2,240' of Lot 8, A (ICC Documents, pp. 648-52); Deed No. 15816, James Mackley, real estate dealer, & wife Jane, St. Claire, Michigan, $1,000 for westerly 200' of easterly 2,240' of Lot 8, A (ICC Documents, pp. 653-57); Deed No. 15817, John A. Neal, machinist, & wife Rose, Toledo, Ohio, $1,000 for westerly 200' of easterly 2,640' of Lot 8, A (ICC Documents, pp. 658-60).

cent or $215 acre.[180] It appears the instant proceeds to Crawford and White from the Lot 8 sales were $13,200. The 37 acres in Lot 9 remained in their possession for future sales or development.

Distribution to Band, October 1929

Even though Indian Affairs had received full payment for the Kettle Point lands in June 1929, distribution to individual band members did not occur until late October after Member of Parliament Gray accepted the wording on the Stony Point patent and those lands were paid for.

In August 1929 Chief Sam Bressette, Maurice George, and John Elijah made yet another plea for distribution:

> With regards to the distribution of the half of the two pieces of land sold off Kettle & Stoney Point, I beg to say that the members of the said bands are getting impatient about it. There are several who have some house preparing to do before the cold weather sets in and there are some aged people who cannot help themselves they are anxious to get their share for to help them along for to make preparations for the winter. So please rush this matter through as the people are anxiously waiting for this distribution of the money.[181]

Unfortunately for the Band, about a week before, Agent Paul had recommended that the distribution "for the 50% of the recent surrenders, at Kettle and Stony Pt. Reserves" be delayed until the end of September because the Sarnia Indian Agency

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[180] Appraisal Report, D.W. Lambert, August 5, 1993 (ICC Documents, pp. 864-919).

[181] Sam Bressette et al. to Indian Affairs, August 31, 1929, NA, RG 10, vol. 7794, file 20-20-2 (ICC Documents, pp. 617-19).

had scheduled annual leave from August 26 to September 28, 1929.[182] Under these circumstances, Indian Affairs headquarters found it convenient in mid-September to refer to the problems associated with the wording on the patent to Scott as a reason for the delay. The mid-September letter to the Chief from the department was so vague that it did not state which company or property was holding up the distribution:

> I have to inform you that the Company that was negotiating for the property is not satisfied with the Patent as issued by the Department. At the present time, it is not known if the deal will be closed, consequently, the Department is not in the position to make a cash distribution to your members, but I trust the matter will be adjusted at an early date when a distribution can be made.[183]

A telegram from the exasperated Chief to the Superintendent General on October 18, 1929, focused on the sale to Scott:

> What is holding money up for land we sold to W.J. Scott Sarnia Indians of Stoneypoint and Kettlepoint want their money as soon as possible rush answer collect.[184]

Sometime in October 1929, Scott's payment for the Stony Point lands was recorded in the trust fund ledger under "Chippewas of Kettle and Stony Point." The

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182 Paul to McLean, August 21, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 614).

183 A.F. Mackenzie, Acting Assistant Deputy and Secretary, to Chief Sam Bressette, September 14, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 628).

184 Bressette to Superintendent General, Indian Affairs, October 18, 1929, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 664).

day of the entry was not recorded.[185] Finally, in mid-October 1929, headquarters mailed a cheque for $10,190 to Agent Paul, which represented 50 per cent of the amount received from "the sales of lands on the Kettle and Stony Point Reserve . . . to Mr. Crawford and Mr. Scott."[186]

A letter dated October 29, 1929, from Paul to McLean indicates that Paul distributed $8,877.44 of the $10,190.00. The difference between what he distributed and what he received for distribution was accounted for as surplus division, the amount due absentees, and as collections on loans, on land sales, and on seed.[187] No money was payable to families on account of members who had died since the surrender.[188]

For most Band members, a full two years and seven months elapsed between the date of the Kettle Point surrender vote and when they had a share of the proceeds from the sale in hand.[189] In 1930, Indian Affairs wrote to Ontario Lands

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185 Trust Fund Account No. 79, Chippewas of Kettle and Stony Point, 1928-1931, NA, RG 10, [illegible] (ICC Documents, pp. 680-99).

186 McLean to Paul, October 18, 1929, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, pp. 665-67). "Crawford Sale $6,885.00 + Scott [Sale] 13,500.00 = 20,385.00/2 = $10, 192.50"

187 Paul to McLean, October 29, 1929 (ICC Documents, p. 668). McLean had instructed Paul to collect on Band loans to 10 individuals (owing between $26.25 and $143.94 each) and to collect balances owed on seed supplied in 1920 to five people (ranging from $4.50 to $13.75). Describing the occasion as "a splendid opportunity to close old accounts out of the books," he also directed Paul to collect on any other outstanding amounts. McLean to Paul, 18 Oct. 1929, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, pp. 665-67).

188 McLean to Paul, October 18, 1929, NA, RG 10, vol. 7794, file 29020-2 (ICC Documents, pp. 665-67).

189 The trust fund ledger suggests four members did not receive their portion until November 1929; three others were paid in December 1929, April 1930, and July 1931. Trust Fund Account No. 79, Chippewas of Kettle and Stony Point, 1928-1931, NA, RG 10,

Surveyor, W.R. White, to arrange surveys to "establish . . . the limits between the Indian reserves at Kettle and Stony Points and the lands surrendered for sale along the lakeshore."[190]

[illegible] (ICC Documents, pp. 680-99).

[190] A.S. Williams, Indian Affairs, to W.J. Scott, Sarnia Locators, May 22, 1930, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 672); Note initialled "HR," Indian Affairs, to Secretary & Mr. White [Surveyor], Indian Affairs, 22 May 1930, NA, RG 10, vol. 7794, file 29029-2 (ICC Documents, p. 673).

PART III

ISSUES

The purpose of this Inquiry is to determine whether Canada has an outstanding lawful obligation, as set out in *Outstanding Business*, to the Band.[191] Counsel for the Chippewas of Kettle and Stony Point and Canada have each outlined the issues in their submissions, and their respective lists of issues are attached as Appendix B.[192] In our view, the relevant issues are as follows:

1 Was there a valid surrender on March 30, 1927, of 81 acres of Kettle and Stony Point Reserve?

2 If the surrender is valid, are there conditions attached to the surrender and were those conditions fulfilled?

3 Did the Crown have any fiduciary obligations in relation to this surrender and, if so, did it breach those fiduciary obligations?

4 Was the Crown negligent in its conduct before, during, and after the surrender?

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191 The concept of lawful obligation is explained in DIAND, *Outstanding Business: A Native Claims Policy, Specific Claims* (Ottawa: DIAND, 1982), 20:

> A lawful obligation may arise in any of the following circumstances:
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> . . .
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> (ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> (iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> (iv) An illegal disposition of Indian land.

192 Appendix A of Claimant's Submissions and pp. 10-11 of Canada's Submissions. There was no agreement between the parties as to the specific issues to be addressed by the Commission in this inquiry.

PART IV

ANALYSIS

BACKGROUND

As noted above, this matter was simultaneously the subject of an inquiry before this Commission and the subject of a court case. In 1992 the Band filed suit against the Crown, claiming that the surrender was invalid and that the Crown breached its fiduciary duty. The Band was seeking a declaration that the surrender and subsequent Crown patent were void, as well as damages for breach of fiduciary duty. In 1995, the Attorney General of Canada and other defendants brought a motion for summary judgment against the Band on the issue of validity. In other words, the Crown argued that the question of whether the surrender was valid did not amount to a genuine issue for trial, and therefore the Band's claim for declaratory relief should be dismissed. The motions judge agreed with the Crown. He held that the surrender was valid and unconditional, despite the alleged irregularities in the surrender vote and subsequent sale transaction, and he dismissed the Band's claim for recovery of the land.[193] This decision was recently upheld on appeal.[194]

Before examining in detail the reasons of the motions judge and Ontario Court of Appeal, it is important to note that the claim for damages for breach of fiduciary duty was not dismissed and the Band may proceed to trial on that issue. The courts did not rule on the breach of fiduciary duty claim.

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193 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Ont. Ct (Gen. Div.)).

194 *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 (CA).

Reasons of the Motions Judge

The essence of the Band's case was that the surrender was invalid because the purchaser was present at the surrender meeting and paid Band members to influence them to vote in favour of the surrender, contrary to the *Royal Proclamation* and *Indian Act*. More specifically, the Band pointed to the following irregularities:

1 the absence of a Band Council Resolution convening the General Council for the surrender vote;

2 a lack of Band member status of some of those who voted on the surrender;

3 the possible underage status of some of the voters;

4 the non-attendance by Band members recorded as voting in favour of the surrender;

5 the attendance of a non-Band member (Crawford) at the vote and the offering of cash payments by Crawford to the voters; and

6 formal irregularities in the "Proof of Assent to Surrender" documentation.

Along with the lack of compliance with the *Indian Act*, the Band also contended that

1 the surrender was conditional and the necessary conditions were not fulfilled;

2 the circumstances surrounding the surrender amounted to unconscionable conduct and therefore vitiated the Band's assent to the surrender;

3 the Band was misdescribed in the surrender documents, rendering the documents invalid; and

4 the ultimate conveyance to Crawford and White jointly rather than just Crawford, as had been agreed upon, rendered the surrender illegal.

Killeen J began by considering the history of the surrender and the enactments in place governing surrenders of Indian lands, namely, the *Royal Proclamation of 1763* and sections 47 to 51 of the *Indian Act*, RSC 1906, c. 81. The *Royal Proclamation* attempted to address the problem of frauds and abuses occurring in the purchase of Indian lands by prohibiting private purchases of Indian lands and permitting aboriginal land rights to be extinguished only through voluntary surrender to the Crown.[195] Three basic principles underlie the *Royal Proclamation's* provisions:

> First, First Nations are to be protected in their lands by the Crown. Second, legitimate settlement may take place in areas designated from

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195 The relevant part of the *Royal Proclamation of 1763* reads as follows:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively with in which they shall lie . . .

> time to time by the Crown. Third, before an area can be settled, any native land rights must be ceded voluntarily to the Crown.[196]

It is through its role as intermediary between the Indians and purchasers that the Crown assumes a protective and fiduciary role. Furthermore, that part of the *Indian Act* dealing with "Surrender and Forfeiture of Lands in Reserve" implements, by way of statute, the general principles outlined in the *Royal Proclamation*. Section 48 prohibits the direct sale of reserve lands and section 49 sets out the procedural requirements for a valid surrender:

> 48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part: Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage in the interests of the Indians, of wild grass and dead or fallen timber.
>
> 49. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

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[196] B. Slattery, "First Nations and the Constitution" (1992) 71 *Can. Bar Rev.* 261 at 290. This work was quoted with approval by Killeen J in *Chippewas of Kettle and Stony Point*.

> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
>
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, or in either case, before some other person or other specially thereinto authorized by the Governor in Council.
>
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.
>
> 50. Nothing in this Part shall confirm any release or surrender which, but for this Part, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than His Majesty, shall be valid.

Killeen J agreed that sections 48 to 50 of the *Indian Act* stipulate mandatory preconditions to the validity of any surrender, but held that all these preconditions were met in this case. The surrender was assented to by a majority of male members at a General Council meeting that was called according to the rules of the Band and conducted in the presence of the Indian Agent. He rejected the Band's argument that, in accordance with the rules of the Band, a Band Council Resolution was required to authorize the meeting. In fact, the calling of the General Council meeting had the support of the Band, and the Chief and councillors. Furthermore,

he found that there was no credible evidence to support the argument that some of those who voted in favour of the surrender had no status as Band members.

The Band also argued by implication from section 49(2) of the *Indian Act*, which states "[n]o Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near . . . the reserve," that the prospective purchaser Crawford should not have been at the meeting nor been allowed to make cash payments to the voters. Killeen J disagreed. He held that there was nothing in the *Indian Act* or *Royal Proclamation* to prohibit direct dealing – that is, the attendance of Crawford – at the surrender meeting, or the cash payments. The *Royal Proclamation* does not prohibit direct dealings *per se*; it prohibits direct sales. Moreover, it would have been open to Parliament to prohibit, under the *Indian Act*, all direct dealings and the attendance of outsiders at surrender meetings, but it did not do so.

Although the motions judge was satisfied that there was no express or implied statutory prohibition against Crawford's conduct, he did add the following remarks:[197]

> There can be little doubt that these cash payments, and the promises which preceded them, have an odour of moral failure about them. It is, perhaps, hard to understand why the Departmental officials could countenance such side offers even in the different world of the 1920s in which they were working. However, as I have said above, I cannot read a statutory prohibition against them within the statutory code of the Act.

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197 *Chippewas of Kettle and Stony Point*, at 690.

Killeen J also rejected the Band's technical argument that the certification on oath of the assent to surrender was not properly done, and that the Band was misdescribed in the surrender documents. None of these minor deficiencies goes to the substantive validity of the surrender, because the provisions that were not strictly complied with are directory rather than mandatory.

The Band further argued that the surrender was actually conditional, and that the conditions failed or were thwarted by Crawford's post-surrender conduct. One of the main conditions of the agreement, according to the Band, was a quick completion of the cash sale, which would have allowed a partial distribution of the proceeds to the Band members within months of the surrender. Since the money was not received until two years later, the Band contended that the condition was not met and a second surrender was required to pass valid title to Crawford.

Killeen J acknowledged that the post-surrender conduct of Crawford, the Department, politicians, and others was "sometimes puzzling, sometimes incomprehensible, and sometimes even boarding on the margins of greed and venality,"[198] and he accepted that "the two-year delay in closing has an arguably excessive and even unconscionable character."[199] However, following *Smith v. R.*,[200] he held that the surrender was unconditional and absolute because it contained granting language "cast in the widest possible terms,"[201] releasing all rights to the Crown.

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198 *Chippewas of Kettle and Stony Point*, at 693.

199 *Chippewas of Kettle and Stony Point*, at 694.

200 [1983] 1 SCR 554, 147 DLR (3d) 237.

201 *Chippewas of Kettle and Stony Point*, at 694.

With respect to the argument that the bargain was unconscionable, Killeen J was of the view that the equitable doctrine of unconscionability applies only to unfair bargains in private transaction and thus has no application to the unique legal regime governing surrenders under the *Royal Proclamation* and the *Indian Act*. Moreover, he stated that "a fair bargain is not a condition precedent to the exercise of the surrender power under s. 49 of the Act or to the acceptance of a surrender by the Governor in Council."[202] Accordingly, unconscionability does not go to the validity of the surrender but to the question of fiduciary duty, a question which was not before the court.[203]

Finally, the Band asserted that assent to the surrender was induced and coerced by economic duress, as evidenced by the promise of the $15 payments and possibly the Band's economic circumstances in 1927. Killeen J rejected that argument as well, reasoning that the Band had to be party to a contract for the doctrine of duress to be applicable, a precondition which did not exist in the case at hand.[204] He also questioned again the wisdom of "injecting a narrow contract doctrine in the interstices of the *Indian Act*."[205]

Reasons of the Ontario Court of Appeal

The Band appealed Killeen J's decision to the Ontario Court of Appeal. The court dismissed the appeal, agreeing with Killeen J that the claim for a declaration that

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202 *Chippewas of Kettle and Stony Point*, at 698.

203 *Chippewas of Kettle and Stony Point*, at 698.

204 *Chippewas of Kettle and Stony Point*, at 699.

205 *Chippewas of Kettle and Stony Point*, at 699.

the surrender was invalid raised no genuine issue for trial. Although the Band made essentially the same arguments on appeal, it was able to rely on the Supreme Court of Canada's decision in the *Apsassin* case,[206] which was released several months after Killeen J's decision. That case is important because it sets out an "intention-based approach" to determining the nature and legal effect of dealings between aboriginal people and the Crown with respect to reserve lands, and clarifies the nature of the Crown's pre-surrender fiduciary duties.

In *Apsassin*, the Supreme Court considered whether a 1945 surrender of a reserve "for sale or lease" included mineral rights. The issue arose because in 1940 the Band had surrendered the mineral rights "for lease." Some years later, oil and gas deposits were discovered on the surrendered land.

On the issue of the nature and legal effect of the 1945 surrender "for sale or lease," Gonthier J, writing for the majority on this point,[207] rejected technical statutory interpretation arguments grounded in the definition of "reserve" and "Indian lands" in the *Indian Act*.[208] He also rejected arguments that relied on

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206 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344, [1996] 2 CNLR 25 [hereinafter *Apsassin*].

207 The majority/concurring opinion split in *Apsassin* is somewhat complex, but breaks down as follows. The reasons of Gonthier J won the support of the majority of the Court. McLachlin J wrote reasons concurring in the result, but disagreeing with Gonthier J on the issue of whether the 1945 surrender included mineral rights. Gonthier J held that the surrender did include the mineral rights, and he came to that conclusion by adopting an intention-based approach. In addition, although Gonthier J agreed with McLachlin J's conclusion that the Crown committed a post-surrender breach of fiduciary duty in dealing with the mineral rights, his reasons were different. Gonthier J agreed with McLachlin J's analysis of the surrender of the surface rights, including pre- and post-surrender duties and breaches. Thus, the reasons of McLachlin J are instructive on breach of fiduciary duty and the directory rather than mandatory nature of section 51 of the *Indian Act*.

208 One argument was that mineral rights surrendered for lease constituted a "portion of a reserve" and therefore would have the status of "Indian lands" following

common law property rules, such as the presumption that a general conveyance passes all interests except those specifically reserved in the deed of transfer. Instead, he adopted an intention-based approach, holding that the legal character of the 1945 surrender, and its effect on the earlier surrender, should be determined by reference to the intention of the Band. This approach is to be preferred to a technical one, according to Gonthier J, because

> [a]s McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. . . . In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.[209]

As noted, Madam Justice McLachlin recognized the importance of autonomy in her discussion of the surrender of surface rights, stating that the provisions in the *Indian Act* for the surrender of reserves strike a balance between autonomy and protection.[210] The aim is to ensure "that the true intent of an Indian Band is respected by the Crown."[211]

It was clear on the facts in *Apsassin* that the Band understood that by agreeing to the surrender for sale or lease it would be transferring all its rights in the reserve

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surrender, which in turn means that the mineral rights were no longer part of the reserve available to be surrendered later for sale or lease.

209 *Apsassin*, at 358-59.

210 *Apsassin*, at 370.

211 *Apsassin*, at 395.

to the Crown in trust. The Band did not intend to hold rights over the reserve once the surrender was completed. Given this clear intention, the 1945 surrender was properly interpreted as a variation of the trust created by the first surrender; it subsumed the earlier agreement and expanded it by including surface rights in the surrender and giving the Crown, as trustee, discretion to sell or lease.

Gonthier J went on to say that, "if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention," he would be reluctant to give effect to the second surrender as a variation of the first.[212] But there was nothing in the circumstances of the transaction or the surrender instrument in *Apsassin* that would make it inappropriate to give effect to the Band's intention to surrender all its rights in its reserve. In fact, the Crown representatives took pains to make sure that the Band members fully understood that they were giving up all rights in the reserve, and generally acted in a conscientious manner.[213]

Following from *Apsassin*, the Chippewas of Kettle and Stony Point argued before the Ontario Court of Appeal that, if there is evidence of "tainted dealings," one must be careful to find a genuine intention by the Band to surrender. Further, the Band argued that there is ample evidence that the dealings here were tainted. The surrender vote was preceded by a promise from Crawford – the prospective purchaser – of a $15 payment to the voting members if they voted in favour of the surrender. The Band's economic circumstances were such that $15, or even $5, would have had significant persuasive power at a surrender meeting. And the Indian

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212 *Apsassin*, at 362.

213 As per the findings of Addy J at trial, outlined in *Apsassin* at 359-60 (per Gonthier J) and 372-73 (per McLachlin J).

Agent stood by while the prospective purchaser handed out $5 to each of the voters at the meeting. The Band submitted that, under these circumstances, it cannot be said that the assent required under the *Indian Act* was obtained.

Laskin JA applied *Apsassin* to the facts at hand and concluded that Killeen J was correct in finding that the Band clearly understood in 1927 that it was surrendering 80 acres of its reserve, and that it intended to do so. The evidentiary record before the court clearly supported that finding; throughout the transaction, from surrender up until closing, the Chief consistently expressed an intention to sell the land and pressed for completion of the deal. The objections to the surrender were voiced by a minority only. In addition, the bonus arrangement was agreed to by Crawford and the Band.

Laskin JA then addressed the issue of "tainted dealings":

> Against this record, what then of the cash payments, which, in the words of the motions judge, had "an odor of moral failure about them"? In my view, there is no evidence to suggest that these cash payments, in the words of McLachlin J., vitiated the "true intent" or the "free and informed consent" of the Band or, in the words of Gonthier J., "made it unsafe to rely on the Band's understanding and intention." In keeping with Apsassin, the decision of the Band to sell should be honoured.[214]

Therefore, the cash payments did not invalidate the surrender, and the validity issue did not present a genuine issue for trial. Laskin JA went on to add the following, however:

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[214] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 at 106 (CA).

> . . . the cash payments or alleged "bribe" and consequent exploitation or "tainted dealings" may afford grounds for the Band to make out a case of breach of fiduciary duty against the Crown. As the parties have recognized, this is an issue for trial. The same may be said of the Band's contention that the sale to Crawford was improvident, he having immediately "flipped" the land for nearly three times the purchase price.[215]

Finally, on the issue of delay, the Court of Appeal held that Killeen J was right in concluding that the surrender was unconditional and the delay of no consequence with respect to the validity of the surrender. Again, however, Laskin JA noted that the Crown's conduct in allowing the delay was open to scrutiny under the claim for breach of fiduciary duty.

ISSUES 1 AND 2: WAS THE SURRENDER VALID AND UNCONDITIONAL?

The purpose of this inquiry is to determine whether there is an obligation, derived from the law, owed by Canada to the Band. In this case, we are faced with the Ontario Court of Appeal's decision on two of the very issues before us. The court has carefully considered all the arguments that were addressed to this Commission on these first two issues, and has determined that the surrender was valid and unconditional. Given that the courts have chosen to characterize the $5 and $10 payments, made directly to the voting members of the Band by the prospective purchaser, as "bonuses" and not "bribes," we cannot find that the conduct of the Crown in any way resulted in "tainted dealings" that would vitiate or call into question the intention of the Band.

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[215] *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 at 106 (CA).

The content and meaning of "lawful obligation" is found in the applicable case law and legislation. Following from the decision of the Court of Appeal, our conclusion is that the surrender is valid and unconditional.

The Court of Appeal made no determination on the issue of breach of fiduciary duty, however. We turn now to that issue.

ISSUE 3: BREACH OF FIDUCIARY DUTY

Submissions of the Parties

The Band submits that, in any case involving a surrender of reserve land, there are three separate phases of the Crown's fiduciary duty to First Nations: pre-surrender, surrender, and post-surrender.[216] In the pre-surrender phase, the Crown has a duty to prevent exploitative bargains. The Band puts forward the following evidence of the Crown's failure in that regard:

1. members of the Band were in dire financial circumstances;

2. the purchaser was in a superior financial and educational position vis-a-vis the members of the Kettle and Stony Point Band;

3. the purchaser was influential in government circles and the D.I.A. supported the purchase to Crawford from the outset;

4. both the purchaser and the Crown knew of the Band's economic position, yet the purchaser was permitted to pay eligible voting members $5 at the General Meeting;

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216 Supplemental Submissions of the Claimant, March 8, 1996, p. 6.

5. the Crown permitted the purchaser to attend the General Meeting and pay "bonuses" directly to those voters in attendance;

6. the price of $85 per acre obtained for the land was below fair market value. The purchaser entered into agreements with third party purchasers for the sale of this land for a price of $300 per acre in the year following the surrender;

7. the D.I.A. itself received a higher offer from White for the same reserve lands after the contract with Crawford had been repudiated; and

8. there was no effort by the D.I.A. to obtain an appraisal of the lands either before the surrender or after complaints flooded their office immediately after the surrender.[217]

With respect to the issue of market value, the Band argues that the Crown had an obligation to establish whether Crawford's offer was fair. However, no appraisal was done at the time of surrender. Moreover, Crawford was able to flip the land he bought at $85 per acre for a price of $300 per acre, which indicates that the price paid to the Indians was well below market value. In addition, an appraisal prepared by the Band's experts estimates the value of the lands in 1927 at between $145 and $165 per acre.[218]

Moving to the second phase, the Band submits that upon surrender the Crown had a fiduciary duty to act in the Band's best interests because it abnegated its

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217 Supplemental Submissions of the Claimant, March 8, 1996, pp. 6-7.

218 Lambert Report (ICC Documents, p. 864).

decision-making power to the Crown.[219] This submission by the Band rests on the following presentation of events:

1. there was no evidence that the Band discussed the matter of surrender at great length;

2. the General Council meeting was convened without a Band Council resolution;

3. only 26 of 44 eligible voters turned out to the meeting;

4. the purchaser was present at the general meeting handing out "bonuses" in an effort to persuade voting members; and

5. the community was financially destitute.

The Band submits that in the post-surrender stage, the Crown had a further obligation to act in the best interests of the Band, exercising the care of a person of ordinary prudence in managing his own affairs.[220] The Band says that the Crown breached this obligation as well: it was aware of White's higher offer, but never relayed that information to the Band. Moreover, the Band submits that the Crown was under a continuing post-surrender fiduciary duty to correct errors.

Canada argues that the Band did receive fair market value for the land, and submits the "Bell report," an appraisal report which shows that the $85 per acre price was reasonable. Canada further maintains that there is no evidence that the terms of the surrender were foolish, improvident, or exploitative, which, according to *Apsassin*, is the necessary basis for arguing that the Crown had a fiduciary duty

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219 Supplemental Submissions of the Claimant, March 8, 1996, p. 8.

220 Supplemental Submissions of the Claimant, March 8, 1996, pp. 10-15.

to block the surrender. In short, Canada's position is that the Band wanted to surrender its reserve, was able to determine its own course of action, and was not vulnerable to any discretion of the Crown.

Did the Crown Breach Its Pre-surrender Fiduciary Duty?

The most recent case from the Supreme Court of Canada on the issue of the Crown's fiduciary duty in the surrender context is *Apsassin*. As discussed above, that case involved the surrender of a reserve that was later found to contain valuable oil and gas deposits. In *Apsassin*, the Blueberry River Band argued that the Crown was under a fiduciary obligation to ensure that the surrender was not improvident, and that the Crown breached its duty because the surrender was not in the Band's long-term best interest. The Crown's rejoinder was that the Band was acting with independent agency when it surrendered its land.

The majority and concurring opinions in *Apsassin* are essentially in agreement with respect to the analysis of fiduciary duties. Madam Justice McLachlin analyzed the fiduciary issue in terms of pre-surrender and post-surrender duties and breaches. She first considered the Blueberry Band's argument that the Crown should have prevented it from surrendering the reserve because it was not in its long-term best interests. The Band argued that the paternalistic scheme of the *Indian Act* imposed a duty on the Crown to protect the Indians from themselves, that is, to block the surrender. McLachlin J disagreed, because the *Act* "strikes a balance between the two extremes of autonomy and protection."[221] There is a recognized historic duty

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221 *Apsassin*, at 370.

on the Crown to prevent exploitative bargains,[222] but that must be weighed against a Band's right to decide whether to surrender its reserve. Thus, it is only where the bargain is *exploitative* that the *Indian Act* imposes on the Crown a fiduciary duty to withhold its consent to the surrender; a Band's surrender decision is to be respected unless it is foolish or improvident. On the facts of *Apsassin*, the surrender was not foolish or improvident; on the contrary, viewed from the perspective of the Band at the time, it made good sense. Therefore, there was no obligation on the Crown, through the Governor in Council, to withhold consent to the surrender.

In this inquiry, Canada argued that, since the sale price of the surrendered land was reasonable, the sale "was not and could not have been foolish, improvident, or exploitative. It is clear from the reasoning in *Apsassin* that the duty of the Crown was to respect the decision of the band."[223] We disagree. The Band surrendered the land for sale to Crawford at $85 per acre, and Crawford then "flipped" the land for $300 per acre. This information, in our view, raises the spectre of exploitation.

The precise details of the flip are interesting. Just over half of the total 81 acres were resold as eight smaller lots at a price of $300 per acre. The deeds were dated October 13, 1928, which means that the lots were sold 10 months *before* Crawford and White finally closed the deal and obtained title. And the resale price represented a threefold increase in market value.

We appreciate that, when a large parcel of land is subdivided, it is not unusual for the market price per acre to increase. There must be some compensation

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222 *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120.

223 Robert Winogron to Isa Gros-Louis Ahenakew, February 14, 1996, p. 8.

for entrepreneurial risk, holding costs, and costs of subdivision in the form of profit. In this case, however, there was virtually no risk in holding this property because the parcels were presold. Nor is it likely that there were major subdivision costs, because the lots were not improved. Therefore, it seems that Crawford and White profited not so much from their entrepreneurial skills as from their having taken advantage of the Indians. They bought the land from the Indians at $85 per acre and then simply turned around and sold eight parcels at $300 per acre.

According to *Apsassin*, the Crown has a fiduciary obligation to prevent such exploitative bargains. Thus, the Crown had an obligation to investigate the matter and determine whether the transaction was fair and to the advantage of the Indians. It may be that the Crown should have recognized the potential value of that part of the reserve. It should have inquired into the potential value to satisfy itself that it made good sense for the Band to sell to Crawford for $85 per acre. The Crown failed to make such inquiries, and by consenting to an exploitative transaction it breached its pre-surrender fiduciary duty.

We note one further point. Even if the huge increase in market value could be attributed almost entirely to the process of subdivision, in that there was a very strong market for smaller lots, it could well be that the Crown had an obligation to recognize the market potential and to subdivide the lots prior to sale to third parties. In fact, the Crown adopted that course of conduct in the Prairie land sales, generally selling surrendered land in quarter-sections at public auction with an upset (minimum) price, in order to give the Indians the benefit of the increase in market value that subdivision can bring. That kind of conduct – taking steps to protect the Indians' interests – is what is required of a fiduciary.

With respect to the Band's second argument, we find that the Band did not abnegate its decision-making power to the Crown. Thus, there is no pre-surrender fiduciary duty arising from that basis.

Did the Crown Breach Its Post-surrender Fiduciary Duty?

It is a well-established principle, based on cases such as *Guerin* and *Apsassin*, that, once land is surrendered to the Crown, the Crown takes on the obligations of a trustee and must exercise any discretion it has solely to further the best interests of the Indian Band.

Canada acknowledges that it was under an obligation here "to deal with the land in accordance with the surrender document, the views of the First Nation, and in a reasonable manner consistent with the exigencies."[224] The surrender document in this case provides as follows:

> TO HAVE AND TO HOLD the same unto His said Majesty The King, his heirs and successors forever, in trust to sell the same at a price of Eighty-five dollars per acre, cash, to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people . . .[225]

Canada argues that there was no breach of fiduciary duty, however, simply because the Crown had a clear mandate under the terms of the surrender document to sell the land for $85 dollars per acre, and it did just that. Thus, the argument is that

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224 Submission on Behalf of the Government of Canada, October 17, 1995, p. 35.

225 Surrender Form No. 65, March 30, 1927 (ICC Documents, pp. 279-84).

Canada did not exercise its discretion improperly, because there was no discretion to begin with.

In our view, the case is not so simple. To reduce the factual context here to a mandate to sell at $85 and a sale at $85 is to mischaracterize the reality. There was, in fact, a tortuous chain of events in which the Crawford transaction was resurrected after apparently having been cancelled *twice* and political intermeddling was the order of the day. To recapitulate the facts, three days after the Department wrote to Crawford purporting to cancel the sale for a second time (in May 1929), Member of Parliament Ross Gray made an offer to purchase the property on behalf of Mr White, for $118 per acre. The Department immediately wrote to Gray informing him that the offer was being considered. But the Band was never apprised of the higher offer. And, shortly after submitting White's offer, MP Gray was able to broker a deal between Crawford and White in which White withdrew his offer and the two became joint purchasers at the original $85 per acre. As Killeen J described it, Mr Gray "played the role of ringmaster for Crawford and White."[226]

These facts show that the Department was in receipt of White's higher offer at a point when it could have cancelled the sale. In December 1928 or early January 1929, the Deputy Superintendent General, apparently on approval from his superiors, *did* cancel the transaction and return the purchase moneys in the form of a cheque to Crawford's lawyers.[227] Indeed, the ability and opportunity to withdraw

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226 *Chippewas of Kettle and Stony Point*, at 678.

227 In December 1928 the Deputy Superintendent General sent a memorandum to the Superintendent General referring to the complaints of Chief Bressette and stating that it was up to the Minister to decide whether to cancel the sale to Crawford because of the long delay in handing over the purchase price. It appears that the Superintendent General did decide to cancel the transaction, because on January 3, 1929, a memorandum was sent to the Accounts Branch asking for a cheque for $7,055 payable to Crawford's law firm. This

from the Crawford transaction explains why the Department did not simply dismiss the White offer.[228]

In our view, these changed circumstances – the opportunity to withdraw from the Crawford transaction, combined with the higher offer – generated an obligation on the Crown to return to the Band to explain what had occurred and to seek the Band's counsel on how to proceed. The Crown, as a fiduciary acting under the terms of the surrender instrument, had a duty to deal with the land in the best interests of the Band. The fact that the surrender document authorized a sale at $85 per acre does not negate that overriding duty. Moreover, in these particular circumstances, the Crown was no longer bound by the $85 term. It was left, then, with a general duty to protect and uphold the interests of the Indians in transactions with third parties.

Therefore, in these specific circumstances, the Crown had an obligation to disclose the higher offer to the Band and to obtain direction from the Band on how to proceed. The Crown had complete control of the situation, but, rather than fulfil those obligations, Crown officials instead bowed to political pressure and put the interests of the Band behind third-party economic interests. A fiduciary's duty is that of utmost loyalty to its principal. Measured against that standard, the Crown's conduct amounts to a patently clear breach of fiduciary duty.

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memorandum says that the "transaction has been cancelled at the request of the Band and for other reasons." See *Chippewas of Kettle and Stony Point*, at 674. Authority for the Superintendent General to cancel a surrender may be found in section 64 of the *Indian Act*.

[228] The 1906 *Indian Act* is silent on matters of surrender variation, revocation, and resurrender, so it is not entirely clear whether it was necessary for the Department to obtain a revocation of the surrender and a new surrender or whether it could have simply gotten a variation of the original surrender. But whatever the technical issues are, it remains that it was open to the Crown to cancel the Crawford transaction.

That does not end our analysis of the Crown's post-surrender conduct. We are of the view that there was another breach, arising from the two-year delay between the surrender and the closing payment. In the 1925-29 period, the Band members were in difficult economic circumstances and understood that the surrender would bring them much-needed cash. It was not reasonable for them to expect, or agree to, a delayed closing date. Although the Band's expectation of a quick cash sale did not amount to an actual condition of the surrender (because it was not formally assented to by the Band or incorporated into the surrender document), in our opinion it did amount to an implied term of the surrender. According to *Guerin*,[229] the Crown is not empowered by a surrender document to ignore oral and implied terms that the Band understood would be the terms of the transaction. As Dickson J (as he then was) stated, such terms "inform and confine the field of discretion within which the Crown was free to act."[230] The Crown, in this case, acting as a fiduciary, was not permitted simply to ignore the Band's understanding of the terms of the transaction or its underlying economic needs. Thus, the Crown had no discretion to complete the transaction after the two-year delay, particularly since the delay here can be explained only by bumbling and backroom political dealing.

ISSUE 4: WAS THE CROWN NEGLIGENT?

The Band also argued that Canada was negligent. The factors in support of this argument are similar to those advanced in support of the breach of fiduciary duty

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229 [1984] 2 SCR 335, [1985] 1 CNLR 120 (SCC).

230 *Guerin*, at 388.

issue. Given our conclusion that Canada breached its fiduciary obligation to the Band, we do not find it necessary to address the negligence argument. A fiduciary is required to act with reasonable diligence to protect the interests of its principal.[231] In this case, the fiduciary duty encompasses the duty of care.

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231 *Apsassin*, at 366.

PART V

FINDINGS AND RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Chippewas of Kettle and Stony Point First Nation. To determine whether this claim is valid, we considered the following specific legal issues:

1 Was there a valid surrender on March 30, 1927, of 81 acres of the Kettle and Stony Point reserve?

2 If the surrender is valid, are there conditions that attach to the surrender and were those conditions fulfilled?

3 Did the Crown have any fiduciary obligations in relation to this surrender and, if so, did it breach those fiduciary obligations?

4 Was the Crown negligent through its conduct before, during, and after the surrender?

Our findings are summarized as follows:

ISSUES 1 AND 2: WAS THE SURRENDER VALID AND UNCONDITIONAL?

Our task in this inquiry is to determine whether there is an obligation, derived from the law, owed by Canada to the Band. In this case, we were faced with the Ontario Court of Appeal's decision on two of the very issues before us. The court has carefully considered all of the arguments that were addressed to this Commission on these first two issues, and has determined that the surrender was valid and unconditional. The content and meaning of "lawful obligation" is found in the

applicable case law and legislation. Following from the decision of the Court of Appeal, our conclusion is that the surrender is valid and unconditional.

ISSUE 3: BREACH OF FIDUCIARY DUTY

We find that Canada had pre-surrender and post-surrender fiduciary duties towards the Band and that it breached those duties.

The Crown breached its pre-surrender fiduciary duty by consenting to an exploitative transaction. Crawford bought the land from the Indians for $85 per acre and immediately turned around and carved out eight lots, which he sold for $300 per acre. The profit cannot be attributed to improvements or entrepreneurial risk, since the lots were presold and unimproved. According to *Apsassin*, the Crown has a fiduciary obligation to prevent exploitative bargains. Thus, the Crown had an obligation to to inquire into the market potential of the land and satisfy itself that it made good sense for the Band to sell to Crawford for $85 per acre. It failed to do so, and by consenting to an exploitative transaction it breached its pre-surrender fiduciary duty.

The Crown also breached its post-surrender duty to the Band in failing to disclose White's higher offer and failing to seek the Band's counsel on how to proceed. The Department had the discretion to cancel the Crawford transaction when the White offer was made. The Department breached the fiduciary duty attached to this discretion by subordinating the interests of the Band to third-party economic interests. Furthermore, the Crown breached its fiduciary duty by ignoring an implied term of the surrender that the transaction close in a timely manner and allowing the transaction to close two years after the surrender.

ISSUE 4: WAS THE CROWN NEGLIGENT?

In the light of our finding on Issue 3, it is not necessary to consider this issue.

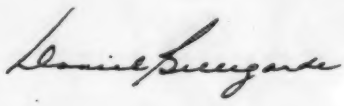
RECOMMENDATION

We find that this claim discloses breaches of Canada's fiduciary obligations to the First Nation. We therefore recommend to the parties:

> **That the claim of the Chippewas of Kettle and Stony Point First Nation be accepted for negotiation under the Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

Roger J. Augustine
Commissioner



Daniel J. Bellegarde
Commission Co-Chair

APPENDIX A

CHIPPEWAS OF KETTLE AND STONY POINT FIRST NATION INQUIRY

1	Decision to conduct inquiry	February 2, 1994
2	Notices sent to parties	February 2, 1994
3	Planning conferences	April 18, 1994 October 17, 1994
4	Community session	March 8, 1995

The Commission heard from the following witnesses: Rachel Shawkence, Angeline Shawkence, Charles Shawkence, Earl Bressette, Chief Thomas Bressette, Bonnie Bressette, Emery Shawanoo, Kalvin George.

5	Expert evidence session	July 17, 1995

The Commission heard from Victor A. Gulewitsch.

6	Legal argument	October 26 and 27, 1995

7 Content of the formal record

The formal record for the Chippewas of Kettle and Stony First Nation Inquiry consists of the following materials:

- 11 exhibits tendered during the inquiry, including the documentary record (4 volumes of documents with annotated index)
- written submissions of counsel for Canada and the claimants
- transcripts of the community session, expert session, and oral argument session
- correspondence among the parties and the Commission

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX B

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR CHIPPEWAS OF KETTLE AND STONY POINT FIRST NATION AND CANADA

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR CHIPPEWAS OF KETTLE AND STONY POINT

The Band through its written "Submission"[1] formulated the issues as follows:

(1) Validity of Surrender

1. Was the payment of $15.00 by Crawford to eligible voting members of the Band an inducement to vote in favour of the surrender of the lands for sale to Crawford? If so, does such conduct contravene the provisions of the *Indian Act* R.S.C. 1927, c.98, Sections 49-51 or the *Royal Proclamation of 1763*?

2. Was the $15.00 payment part of the consideration for the purchase of the lands to be surrendered? If so, does such payment contravene the provisions of the *Indian Act*, supra or the *Royal Proclamation of 1763*?

3. Did the surrender vote held March 30, 1927 comply with the requirements of Section 51 of the *Indian Act*?

4. Was Crawford entitled to negotiate directly with the Band and its members for the purchase of the lands at Kettle Point? If not, what is the effect of such conduct on the validity of the surrender?

5. Was Crawford entitled to be present at the General Council meeting held on March 30, 1927 for the purpose of the surrender vote? If not, what is the effect of his presence on the validity of the surrender?

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[1] Submission of The Chippewas of Kettle and Stony Point, October 16, 1995, Appendix A.

6. Was the surrender and later sale transaction to Crawford and White unconscionable having regard to the relative bargaining powers of Crawford and the Band, and the purchase price paid for the lands?

(2) Terms of Surrender

7. Did Crawford repudiate the terms or conditions upon which the surrender was given by the First Nation by failing to remit payment of the purchase price until approximately seventeen months after the surrender vote was held?

   (a) Did Crawford's proposal contemplate an immediate sale of the land, subject to Department of Indian Affairs approval?

   (b) What were the terms and conditions upon which the lands were surrendered by the Band?

8. What was the effect of Crawford's repudiation on the surrender or on the interest of the First Nation in the lands at Kettle Point?

9. What was the effect of the Department of Indian Affairs' notice to Crawford that his purchase transaction was cancelled and the refund of his purchase monies on two occasions, on the surrender or the interest of the First Nation in the lands at Kettle Point?

10. Was the Department of Indian Affairs entitled to transfer title to the lands at Kettle Point to Crawford and White in the absence of a new surrender vote?

11. In completing the sale of the lands to Crawford and White did the Department of Indian Affairs, in fact, rely upon the advice of Chief Sam Bressette that the Band was willing to complete the transaction if interest was paid by Crawford? Was the Department of Indian Affairs entitled to rely upon that advice in the absence of a new surrender?

(3) Breach of Fiduciary Obligations Etc.

12. Did the Department of Indian Affairs owe fiduciary obligations to the Band and its members with respect to the negotiation of the purchase price and the conduct of the surrender vote, i.e. did fiduciary obligations exist prior to the surrender having regard to the relationship between the Band and the Department of Indian Affairs? If so, what were those obligations?

13. Did the Department of Indian Affairs breach its fiduciary obligations to the Band and its members for the reasons set out in paragraph 57 (i) - (iv), (xiv) - (xxi), (xxiv) - (xxxv) inclusive, of the Amended Statement of Claim?

14. Does the conduct refer [sic] to in question 13 above amount to a breach of trust or negligence by the Department of Indian Affairs?

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR CANADA

The Government of Canada through its written "Submission"[2] formulated the issues as follows:

First Issue: $15.00 Payments
The claimants argue that $15.00 payments made directly to voting members of the Band, whether they amount to an inducement to vote or to part of the consideration for the lands surrendered, contravened sections 47 - 49 of the *Indian Act*, 1906, as amended, and/or the *Royal Proclamation*. Accordingly, they argue, the surrender is void.

Second Issue: Section 49 of the Indian Act
The claimants argue that the surrender vote held on March 30, 1927 did not comply with the requirements of sections 47 - 49 of the *Indian Act*.

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[2] Submissions on Behalf of the Government of Canada, October 17, 1995, pp. 10 and 11.

Third Issue: Unconscionability
The claimants argue that the 1927 surrender and the subsequent sale to Crawford and White were unconscionable, and therefore, void, having regard to the purchase price for the lands, the promise of payment of $15.00 to eligible voters, and the relative bargaining powers of the purchasers and the Band.

Fourth Issue: Absolute Surrender
The claimants argue that, assuming that the surrender is otherwise valid, certain terms and conditions attach to the 1927 surrender. More particularly, the claimants claim that it was an implied term of the surrender that the sale of the lands would be completed within a certain time frame. According to the claimants, the alleged breach of that term by the Crown and the purchasers makes the 1927 surrender void.

Fifth Issue: Fiduciary Obligation
The claimants argue that the Crown, through its conduct before, during and after the 1927 surrender, breached fiduciary obligations it owed to the Band.

Sixth Issue: Breach of Trust and/or Negligence
Finally, the claimants argue that the Crown's conduct before, during and after the surrender of 1927 amounts to breaches of trust and/ or negligence.